85-1834

FILED
MAY 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

MEYER BILLER,

Petitioner

v.

STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF CONNECTICUT

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May , 1986

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QUESTIONS PRESENTED

1. Whether a prior conviction then on appeal may be used to impeach a defendant when the prior conviction is later determined to be constitutionally invalid (1) because it was based on compelled testimony in violation of New Jersey v. Portash (2) because it was based on conduct which on remand was held not to constitute a crime as a matter of law in violation of due process.

2. Whether a prior conviction then on appeal may be used wether a prior conviction then on appeal may be used to enhance a defendant's sentence when the prior conviction is later determined to be constitutionally invalid (1) because it was based on compelled testimony in violation of New Jersey v. Portash and (2) because it was basesd on conduct which on remand was

held not to constitute a crime as a matter of law, the use of which violated due process.

3. Whether the State of Connecticut by interpretation of state law, constitutionally can permit the police to arrest an individual without probable cause, conduct a search incident to that illegal arrest, and then use the fruits of the illegal search to convict the defendant of a distinct crime.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED..... 1

TABLE OF CASES.....iv

OPINION BELOW..... 2

JURISDICTION..... 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED..... 3

STATEMENT OF THE CASE..... 5

REASONS FOR GRANTING THE WRIT..... 14

CONCLUSION..... 55

TABLE OF AUTHORITIES

Cases

United Stats Supreme Court Cases	Page
Baldasar v. Illinois, 446 U.S. 222 (1985).....	32
Beck v. Ohio, 379 U.S. 89 (1964).....	45,46
Burgett v. Texas, 389 U.S. 109 (1967).....	26,32
Carroll v. United States, 267 U.S., 132 (1925).....	47
Counselman v. Hitchcock, 142 U.S. 547 (1892).....	18,19
Gideon v. Wainwright, 372 U.S. 335 (1963).....	20,26
Harris v. New York, 401 U.S. 222 (1971).....	16
Henry v. United States 361 U.S..98 (1959).....	48
Illinois v. Gates, 462 U.S. 213 (1983).....	36
In re. Winship, 397 U.S. 358 (1970).....24,31,32	
Kastigar v. United States, 406 U.S. 441 (1972).....	18

Lefkowitz v. Turley, 414 U.S. 70 (1973).....18

Luce v. United States --- U.S. --- 105 S.Ct. 460 (1984).....28,29

Loper v. Beto, 405 U.S. 473 (1972).19,20,24

Mapp v. Ohio, 367 U.S. 643 (1961).....36

Mincey v. Arizona, 437 U.S. 385 (1978).....17

Miranda v. Arizona 384 U.S. 436 (1966).....16

New Jersey v. Portash, 440 U.S. 450 (1979).....14,16,17,18,29

Pickelsimer v. Wainright, 375 U.S. 2 (1963).....20

Soper v. Beto, 405 U.S. 473 (1972).....19,20,24,27,28

Spencer v. Texas, 385 U.S. 554 (1967).....24,25

Thompson v. Louisville, 362 U.S. 199 (1960).....24,32

United States v. Tucker, 404 U.S. 443 (1972).....30,31

United States v. Ventresca, 380 U.S. 102 (1965).....46

United States v. Watson, 432 U.S. 411 (1976).....46

Wong Sun v. United States, 371 U.S. 471 (1963).....36,45,47,48

State Court cases

State v. Biller, 190 Conn. 594, 462 A.2d 987 (1983).....12,16,19,22,23,26, 27,28,29,31,33

State v. Biller, 5 Conn. App. 616 -- A.2d -- (1985).....8,35,36

State v. Evans, 165 Conn. 61, 327 A.2d 576 (1973).....27

State v. Iasevoli, 188 Conn. 325 (1982).....29

State v. Licari, 153 Conn. 127, 214 A.2ds 900 (1965).....35

State v. Privitera, 1 Conn. App. 709, 476 A.2d 605 (1984).....35

Constitutional Provisions

Fourth Amendment to the United States Constitution.....13,34,35,36,46

Fifth Amendment to the United States Constitution.....12,15,16,17,21,22

Fourteenth Amendment to the United States Constitution.....passim

Statutes:

Connecticut General Statute §53a-167a....7

Connecticut General Statute §38-69.50,52,54

Connecticut General Statute §38-71.....7,47,48,52,54

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

The petitioner, Meyer Biller, respectfully prays that a writ of certiorari issue to review the judgment and the decision of the Supreme Court of

the State of Connecticut which on March 6, 1986 denied certification to appeal from the judgment of the Appellate Court of the State of Connecticut rendered on December 7, 1985.

OPINION BELOW

On March 6, 1986, the Supreme Court of the State of Connecticut denied certification to appeal from the decision of the Appellate Court of Connecticut which was entered on December 17, 1985 as State of Connecticut v. Meyer Biller, 5 Conn. App. 616 A.2d (1985). The opinion and order appear in the Appendix to this petition.

JURISDICTION

By order dated March 6, 1986 the Supreme Court of the State of Connecticut denied the defendant's petition for

certification to appeal from the judgment of the Appellate Court of the State of Connecticut, that judgment was rendered on December 17, 1985. A motion to reargue before the Appellate Court was denied on January 29, 1986. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional provisions: The Fourth Amendment to the United States Constitution which provides,

> "(Right of search and seizure regulated.) The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution which provides,

> "(Criminal prosecutions, trials and punishments. Due process. Taking private property for public use.) No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without the process of law, nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment of the United States Constitution which provides in relevant part,

> "(Citizenship defined. Privileges

> of citizens.) Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Section 38-69 of the Connecticut General Statutes provides in relevant part:

> "Public Adjuster" means any person, partnership, association or corporation who or which practices as a business the adjusting of loss or damage by fire or other hazard under any policies of insurance in behalf of the insured under such policies, or who advertises or solicits business as such adjuster, or holds himself out to the public as engaging in such adjusting as a business.

Section 38-71 of the Connecticut General Statutes provides:

> "Penalty for acting as agent, broker or public adjuster without license. Any person who acts within this state, either in his own behalf or as representative or agent of any other person or any partnership, association or corporation, as an insurance agent or as an insurance broker, or as a public adjuster, unless such person holds a license then in force from the commissioner authorizing him so to act, shall be fined not more than five hundred dollars or imprisoned not more than three months or both."

Section 53a-167a of the Connecticut General Statutes provides:

> "Interfering with an officer: Class A misdemeanor. (a) A person is guilty of interfering with an officer when he obstructs, resists, hinders or endangers any peace officer or fireman in the performance of his duties. (b) Interfering with an officer is a class A misdemeanor."

STATEMENT OF CASE

The defendant was arrested for acting as a public adjuster without a license, General Statutes §38-71, and by substituted information was also charged with interference with a police officer, General Statutes §53a-167a. After the trial, the jury retired, announced a deadlock, received the so-called "Chip Smith" charge, deliberated some more, and returned deadlocked on the charge of acting as a public adjuster without a license, but convicted the defendant of interfering with a police officer. The trial court (Sullivan, J.) then sentenced the defendant to one year and imposed a $500.00 fine on the interfering charge, and declared a mistrial on the other. The defendant appealed to the Appellate Court which

affirmed the conviction, State v. Biller, 5 Conn. App. 616, --A.2d-- (1985) (App. 3) A motion to reargue was denied on January 29, 1986. (App. 13) The Connecticut Supreme Court on March 6, 1986 denied defendant's petition for certification to appeal to that Court (App. 2)

B. FACTS

On March 12, 1981, a fire took place at a house owned by Wilken Shaw at 79 Hallock Street in New Haven. At the scene of the fire, Joseph Toscano, an arson control assistant inspector assigned to the office of the New Haven State's Attorney, saw the defendant approach Shaw and his daughter-in-law, Willa Shaw. Toscano watched as the defendant spoke to the Shaws and as Wilken Shaw signed some documents. Toscano and another officer, Joseph Howard,

approached the trio and heard the defendant state to the Shaws that he would contact the insurance company. (Tr. 81-85, 316, 393-94.) The Shaws testified that they then asked the defendant to tear up the documents because Wilken Shaw had signed them without consulting his daughter-in-law and that the defendant complied. The police officers agreed that the documents were torn up after they approached the Shaws, but before the defendant's arrest. (Tr. 170, 175-76, 251, 256, 325-26, 395-96.)

Because he knew the defendant did not have a public adjuster's license, Toscano subsequently ordered the defendant's arrest. As Officer Howard handcuffed the defendant and tried to search him, the defendant bent over from the waist and kept

his hands over his pockets. The officers then led the defendant to a police car where he permitted the search. (Tr. 326-30, 342-47, 399-400.) The officers found the torn documents and blank originals in the defendant's pockets. (Tr. 400-08.)

The documents were a contract to to appraise and repair the fire damage with a clause authorizing the defendant as agent to select a licensed public adjuster for Wilken Shaw, the insured, and a form selecting Biller Associates as the public adjuster. (Exs. A, B, C, F-1, G-1.) Biller Associates was a separate corporate entity properly licensed with the Insurance Department whose licenced public adjuster was Larry Biller, the defendant's son. The defendant also presented evidence that

there were many other contractor-appraisers in the Greater New Haven area who specialized in fire damage repair and estimates, and who retained public adjusters on behalf of their clients, the insured property owners. (Tr. 128-30, 156-59, 162-65, 258-59, 273-90, 303-308, 462-66, 561-75, 582-95.)

During the trial the defendant filed a motion in limine to prevent the state from impeaching him with two felony convictions which were then on appeal. The trial court denied the motion and, as a consequence, the defendant was prevented from testifying on his own behalf. (App. 53-57) Tr.50, 604). The trial court also took the convictions on appeal into account in sentencing the defendant to the maximum of one year and imposing a $500.00 fine, (App.

11) noting, "two felony convictions in the past even though they are on appeal must be considered". (Tr. 733-34, 763) On appeal to the Appellate Court the defendant raised in his brief the federal issues set forth in this petition; they also were raised in the petition for certification to the Connecticut Supreme Court. (App. 61-65) It has now been determined that the prior convictions were invalid as a matter of constitutional law. The convictions were reversed because they were based on involuntary testimony, in violation of Fifth and Fourteenth Amendment privilege against self-incrimination. State v. Biller, 190 Conn. 594, 605, 462 A.2d 987, 993 (1983)(App. 15-41) On remand the trial court (Higgins, J.) found that the defendant could not have committed a crime

as a matter of law, even under the prosecution's theory of the disputed facts, and dismissed the action. (App. 42-52) The state did not appeal the dismissal. Therefore, it has now been conclusively determined that the trial court in this case acted on what turned out to be misinformation of constitutional magnitude. The prior invalid conviction, which did not even constitute a crime as a matter of law and which was based on coercion, both prevented the defendant from testifying and was used to enhance his punishment.

At trial the defendant filed a motion based on the Fourth and Fourteenth Amendments to suppress the documents seized as a fruit of his illegal arrest. (App. 58) The motion was denied by the trial court and the Fourth and Fourteenth

Amendment issue was raised before the Appellate Court (brief of defendant on appeal p. 12)(App. 66-72) The Appellate Court did not reach the issue because under its analysis of a state case, it was irrelevant. The defendant preserved the constitutional issue by raising it again in his petition for certification to appeal to the Connecticut Supreme Court. (App. 61-65)

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A PRIOR CONVICTION THEN ON APPEAL MAY BE USED TO IMPEACH A DEFENDANT WHEN THE PRIOR CONVICTION IS LATER DETERMINED TO BE CONSTITUTIONALLY INVALID (1) BECAUSE IT WAS BASED ON COMPELLED TESTIMONY IN VIOLATION OF NEW JERSEY V PORTASH (2) BECAUSE IT WAS BASED ON CONDUCT WHICH ON REMAND WAS HELD NOT TO CONSTITUTE A CRIME AS A MATTER OF LAW IN VIOLATION OF DUE PROCESS.

As explained in the facts, the

defendant filed a motion in limine to restrict the use of the the prior conviction then on appeal. The trial judge recognized that the matter was on appeal, but denied the motion. As a result of that ruling, the defendant did not testify in his own defense. (App. 53-57; Tr. 50, 604.) The crux of the problem in allowing a conviction then on appeal to be used for impeachment is that if the judgment of conviction is later reversed, the defendant has suffered, injustly and irreparably, the prejudice caused by the disclosure of the former conviction.

The prior conviction used to impeach the defendant in this case was reversed because he was compelled to give testimony before an investigative grand jury, in violation of his privilege against self-

incrimination. State v. Biller, 190 Conn. 594, 605, 462 A.2d 987, 993 (1983)(Biller I). Unlike testimony obtained in violation of Miranda which may be used for impeachment, Harris v. New York, 401 U.S. 222 (1971), compelled or involuntary testimony may not be used, directly or indirectly, for any purpose. New Jersey v. Portash, 440 U.S. 450, 458-59 (1979); Biller I, supra, 190 Conn. at 605, 462 A.2d at 993. In Portash the defendant was compelled to testify before a state grand jury, much like the defendant in the Biller I. The trial court in Portash ruled that the compelled testimony could be used to impeach the defendant if he took the stand. The defendant did not testify and was convicted. This Court reversed the conviction, emphasizing that the

defendant's testimony before the grand jury was the "essence of coerced testimony" and could not be used for any purpose, impeachment or otherwise. Portash, supra, 440 U.S. at 459. In Mincey v. Arizona, 437 U.S. 385, 398 (1978), this Court declared that any use of an involuntary statement, even for impeachment purposes, is a denial of due process of law. It is therefore well established that within a single prosecution any use of compelled testimony for impeachment or otherwise violates both the privilege against self-incrimination and due process.

It is also clear that evidence derived from involuntary testimony, whether directly or indirectly, cannot be used in any other criminal case, nor can it lead to the infliction of criminal penalties in

other cases. Kastigar v. United States, 406 U.S. 441, 453 (1972)(the privilege prohibits any use of compelled testimony "as well as evidence derived directly and indirectly therefrom"); Lefkowitz v. Turley, 414 U.S. 70, 78 (1973)(a witness protected by the privilege is "protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case") (emphasis added); New Jersey v. Portash, 440 U.S. 450, 457-8 (1979). As this Court said in Kastigar, the privilege against self-incrimination:

> prohibits the prosecutorial authorities from using the compelled testimony in any respect, and therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness. 406 U.S. at 453 (emphasis in original).

In Counselman v. Hitchcock, 142 U.S. 547

(1892), the first case in which this Court considered a challenge to an immunity statute, it held that the statute was deficient because it did not prohibit the use of evidence derived from the compelled testimony of the witness.

In this case the state made derivative use of the defendant's compelled testimony by using the Biller I conviction, itself based on involuntary testimony, to obtain the present conviction. Therefore, the present conviction was derived from the earlier coerced testimony.

A prior conviction used for impeachment, which is later invalidated on constitutional grounds, will impermissibly taint a conviction. Loper v. Beto, 405 U.S. 473 (1972). In Loper, the defendant was tried in 1947 and impeached with four

felony convictions dating from 1931 to 1940. Sixteen years later Gideon v. Wainwright, 372 U.S. 335 (1963), was decided and made wholly retroactive, Pickelsimer v. Wainwright, 375 U.S. 2 (1963)(per curiam)(mem.), thereby voiding the impeachment convictions. In 1969, some 22 years after his conviction, the defendant in Loper sought habeas corpus, claiming that the use of the prior uncounseled convictions for impeachment, later determined to be void, violated due process. The Court agreed, holding that the use for impeachment purposes of convictions later found to be invalid under Gideon deprives a defendant of due process of law, and granted the writ. Loper, supra, 405 U.S. at 483.

This is a much easier case than Loper.

First, the prior conviction was on direct appeal at the time it was offered, minimizing retroactivity issues. Second, the compelled testimony issue was known to the state when it offered the prior conviction for impeachment since the prosecutor was from the same state's attorney's office which compelled the defendant's testimony over his assertion of the privilege before an investigative grand jury, limiting any claim that the prosecutor who offered the evidence could not have anticipated that it was tainted. Third, the defendant informed the trial judge that the prior conviction was on appeal, the preliminary statement of issues had been filed identifying a self-incrimination claim and the case was reversed for well-established Fifth

Amendment principles, limiting any argument that the trial judge could not have anticipated the outcome because of a sudden change in the law. (App. 14-41) Fourth, this case is on direct appeal, minimizing any concerns about the finality of criminal judgments.

The state has used the Biller I conviction, which itself was based on involuntary testimony, to obtain this conviction. Thus, the present conviction is derived from involuntary testimony, in violation of the privilege against self-incrimination and due process of law under the Fifth and Fourteenth Amendments of the United States Constitution.

There is a second reason why the prior conviction is constitutionally invalid. The defendant in Biller I argued that his

actions, even under the prosecution's version of the disputed facts, did not constitute a crime as a matter of law, Biller I, 190 Conn. at 610, 620-21, 562 A.2d 1001, an argument which ultimately prevailed. On remand of Biller I the trial court (Higgins, J.) found that the defendant could not, as a matter of law, have committed the crime with which he was charged and granted the defendant's motion to dismiss. (App. 42-52) The state did not appeal that dismissal. Therefore, it has now been conclusively determined that the defendant in Biller I did not commit a crime.

Since the state, in order to obtain a conviction consistent with due process, is required to prove beyond a reasonable doubt every essential fact necessary to establish

the crime charged, In re Winship, 397 U.S. 358, 364 (1970), the prior conviction, based as it was on innocent activity, necessarily was obtained in violation of specific federal due process of law protection, Thompson v. Louisville, 362 U.S. 199, 206 (1960)(to convict and punish without evidence of guilt violates due process). Therefore, the use of that unconstitutional evidence to obtain this conviction also violates due process. Loper v. Beto, 405 U.S. 473 (1972)(impeachment use of a prior conviction later determined to be constitutionally invalid deprives defendant of due process). In addition to Loper, other significant United States Supreme Court decisions support the defendant's position. In Spencer v. Texas, 385 U.S.

554 (1967), the Court allowed a valid prior conviction to be introduced against the defendant under the Texas recidivist statute even though Texas did not provide a two-stage jury trial, one for the underlying offense and one for the recidivist charge. In upholding that procedure against a general fairness due process argument, the Court noted that the use of the prior conviction involved "no specific federal right--such as that dealing with confessions. . . ." Spencer, supra, 385 U.S. at 565. Here, by contrast, the use of the prior conviction involves coerced testimony, a specific federal right that does deal with confessions and the due process right requiring the state to prove the essential elements of a crime before it can obtain a conviction. Therefore, the

later use of that invalid conviction violates due process. See also, Burgett v. Texas, 389 U.S. 109, 115 (1967)(use of conviction obtained in violation of Gideon v. Wainwright to support guilt or enhance punishment violated a federal constitutional right, was inherently prejudicial, and instructions to disregard the prior convictions did not make the error harmless beyond reasonable doubt).

Both the due process and self-incrimination issues surrounding the use of the Biller I conviction then on appeal for impeachment in this case were briefed and argued before the Appellate Court and also briefed in the petition for certification, whose its opinion ignores them. (App. 3-12) The state claimed that the constitutional issues were not raised

when the use of the prior conviction was discussed at trial. There are, however, several answers to that argument. First, as a matter of state law in Connecticut, a criminal defendant is entitled to raise fundamental constitutional issues for the first time on appeal under the Evans doctrine. State v. Evans, 165 Conn. 61, 327 A.2d 576 (1973). Second, the use for impeachment purposes of a conviction later declared to be constitutionally invalid is itself an issue of constitutional dimension permitting review under Soper v. Beto. Third, the trial judge was informed of the appeal and the record in this case reflects that there was a general discussion of the matter in chambers. (Tr. 604.) Fourth, the preliminary statement of issues was filed in Biller I raising the compelled

self-incrimination issue, a readily available appeal paper which the trial court did not examine, (Tr. 604; Finally, since the Biller I reversal and later dismissal all came about after the trial in this case, this Court can judicially notice those results and, in the interests of justice, reverse the present conviction as it reversed the conviction in Soper v. Beto.

The state may also argue that the issue should not be considered because the defendant did not testify and therefore the prejudice remains speculative, citing Luce v. United States, ____U.S.____, 105 S.Ct. 460 (1984). The short answer is that at the time this case was tried, November, 1982, both the Connecticut Supreme Court and the United States Supreme Court

recognized the prejudice inherent in a defendant's failure to testify and decided appeals based on motions in limine. State v. Iasevoli, 188 Conn. 325, 326-29, 449 A.2d 996, 997 (1982); New Jersey v. Portash, 440 U.S. 450, 453-56 (1979). Furthermore, unlike Luce there is no probative verses prejudice analysis needed to determine admissability. Since Biller I was based on compelled testimony, it should not having been admitted at all.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A PRIOR CONVICTION THEN ON APPEAL MAY BE USED TO ENHANCE A DEFENDANT'S SENTENCE WHEN THE PRIOR CONVICTION IS LATER DETERMINED TO BE CONSTITUTIONALLY INVALID (1) BECAUSE IT WAS BASED ON COMPELLED TESTIMONY IN VIOLATION OF NEW JERSEY V. PORTASH AND (2) BECAUSE IT WAS BASED ON CONDUCT WHICH ON REMAND WAS HELD NOT TO CONSTITUTE A CRIME AS A MATTER OF LAW, THE USE OF WHICH VIOLATED DUE PROCESS.

In sentencing the defendant the trial

court said that the "[t]wo felony convictions [meaning the two counts of Biller I] in the past even though they are on appeal must be considered." (Tr. 763.) The court then sentenced the defendant to the maximum of one year in jail and imposed a $500.00 fine. (Tr. 763-64.)

From the arguments and authorities cited in the previous section of this Petition, it should be clear that the use of a constitutionally defective conviction to enhance a defendant's punishment is itself a due process violation, particularly when the prior conviction has been voided because, as a matter of law, no crime has been committed. In United States v. Tucker, 404 U.S. 443 (1972), the trial judge took into account three previous felonies when sentencing the

defendant. Several years later it was determined that two of the prior convictions were invalid because they were obtained without counsel. In a subsequent collateral proceeding this Court vacated the sentence and remanded for re-sentencing:

> [W]e deal here, not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude. 404 U.S. at 447.

The fact that a person has not committed a crime is surely misinformation of constitutional magnitude. If a person has not committed a crime, then the state has not proven beyond a reasonable doubt the essential facts necessary to constitute that crime, in violation of Fourteenth Amendment Due Process. In re Winship, 397

U.S. 358, 364 (1970); Thompson v. Louisville, 362 U.S. 199, 206 (1960). Therefore, to use that constitutional misinformation to enhance his punishment is to punish the defendant for a crime he did not commit, a violation of a specific federal constitutional due process right. The fact that the prior conviction which enhanced the defendant's sentence was also based on compelled testimony is also misinformation of constitutional magnitude. Under either approach, the defendant is being "denied anew" a "specific federal right", Burgett v. Texas, 389 U.S. 109, 116 (1967). See also, Baldasar v. Illinois, 446 U.S. 222, 224 (1980)(concurring opinion).

The defendant's sentence in this case was enhanced because the trial court took

into consideration the Biller I conviction then on appeal, constitutional misinformation which was as unreliable as anything produced by a judicial system since it did not, in fact, even constitute a crime as a matter of law. Furthermore, the use of that misinformation violated fundamental values central to our judicial systems since it was also based on compelled testimony. Therefore, the sentence below should be vacated and the case remanded for re-sentencing. Since the court below decided otherwise, certiorari should be granted.

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION BELOW ALLOWS THE POLICE TO ARREST AN INDIVIDUAL WITHOUT PROBABLE CAUSE, CONDUCT A SEARCH INCIDENT TO THAT ILLEGAL ARREST, AND THEN USE THE FRUITS OF THE ILLEGAL SEARCH TO CONVICT THE DEFENDANT OF A DISTINCT CRIME.

As explained in the facts, the police searched the defendant at the police car incident to his arrest and seized the documents from his pockets. These documents were then introduced against the defendant. (Exs. A, B, C, F-1 through F-4, G-1 through G-5). No limitation was made as to their use and, quite obviously, they were applicable to both counts. If the defendant had nothing in his pockets, and did not interfere with police activity in any meaningful way, it is unlikely the jury would have convicted him. Therefore, the documents were central to the state's interfering charge, if only to prove intent.

The defendant filed a motion to suppress the documents, inter alia, based on the Fourth and Fourteenth Amendments

which was heard at the same time as the motion to dismiss. (App. 58-60; Tr. Nov. 9, 25.) Although defendant's brief before the court below emphasized the motion to dismiss (because State v. Licari, 153 Conn. 127, 214 A.2d 900 (1965) had not yet been overruled) it pointed out the motion to suppress and expressly concluded the illegal arrest section by stating "[t]he evidence seized from the defendant's person during this illegal arrest must also be suppressed." Brief of Defendant at 12. (App. 72) See also Reply Brief of Defendant.

The court below did not reach the question of probable cause because, under its analysis of State v. Privitera, 1 Conn. App. 709, 476 A.2d 605 (1984), it was irrelevant. State v. Biller, 5 Conn. App.

at 620, 501 A.2d 392 (1985)(App. 3) Therefore, the opinion below would allow, in effect, evidence seized during an illegal arrest to be used to support an interfering charge, which is what happened here. As such, the court below is wrong. The fruits of a search incident to an illegal arrest must be suppressed under the Fourth and Fourteenth Amendments Wong Sun v. United States, 371 U.S. 471, 484-87 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

The defendant's arrest on the charge of acting as a public adjuster was under the totality of the circumstances clearly without probable cause. Gates v. Illinois, 462 U.S. 213 (1983)

At the hearing on the defendant's motions to dismiss and suppress, Toscano, the Arson Control Assistant Inspector,

testified that when he saw Biller approach the scene of the fire, his "investigative instinct was aroused" because he knew Biller did not then have a public adjustor's license. (Tr. Nov. 9, 31, 30-2.) Although Toscano acknowledged that a contractor and an appraiser could each solicit business from an owner at the scene of a fire, he was of the opinion that "anyone, whether he be a building contractor or a private citizen who ·· contracted for a public adjustor would be in violation of the rules...." (Tr. Nov. 9, 56.) He also thought the defendant was acting as a public adjustor because he heard him say to the Shaws that "when the fire department finished what they were doing he would come back and appraise the loss for the insurance company." (Tr. Nov.

9, 34.)

Inspector Toscano's interpretation of the law was wrong. Nothing prohibits a contractor from retaining the services of a public adjustor on behalf of an owner. As Jean Shea, Assistant Division Chief, Licenses and Claims Division, Department of Insurance, explained when cross-examined at trial by the defense:

> Q An insured can authorize a contractor to hire a public adjustor for them?
>
> A That would really be addressed under law of agency. I would presume so. (Tr. 462.)

Allan Sabel, a public adjustor at the scene of the fire, was called at trial by the State. On cross-examination, he confirmed Ms. Shea's understanding of the law. He testified that contractors routinely solicit business at the scene of a fire;

that contractors may hire public adjustors on behalf of owners; and that contracting is not public adjusting. (Tr. 276-77.)

In addition to seeing a transaction taking place at the scene of a fire and hearing the defendant say he would appraise the loss for the insurance company, matters which were legal, the officers testified that Wilken Shaw said to them that the defendant used the words "public adjustor," a factor the officers thought critical in their assessment of probable cause. According to the officers, Shaw told Officer Howard, in a conversation which Toscano claimed he overheard, that the defendant had represented himself to Shaw as a public adjustor. (Tr. Nov. 6, 62-4, 73, 77; Tr. 28, 31, 45.) During the evidentiary hearing Toscano was never asked

by the State to quote the exact words he heard Shaw say. Everything Toscano testified to is consistent with the defendant telling Shaw that he had been a public adjustor in the past, mentioning that fact to Shaw as a credential in his quest for his current construction-appraisal business. For example, Toscano used the following past tense verbs at the hearing: "had represented," "had approached them and represented," "[t]hat he had represented himself as a public adjustor" and "they [the Shaws] stated he had represented himself as a public adjustor." (Tr. Nov. 6, 63-4; 73; 77.) Inspector Toscano was not sure whether Wilken or Willa Shaw used the words "public adjustor" prior to Biller's arrest, but he was certain one of them did. (Tr. Nov. 6,

78-79.)

Officer Howard's testimony at the hearing does not change matters. Howard said Biller was arrested because he "had represented himself to Mr. Shaw and the woman as a public adjustor." (Tr. 28.) That conclusion was based on what "we had seen and with the conversation I had with Mr. Shaw prior to, prior to Biller's arrest." (Tr. 28.) He said that he was at the fire scene when Inspector Toscano called his attention to the defendant. (Tr. 10-11.) He had been on the arson squad only four months and was not sure whether it was legal for a builder to solicit business at the scene of a fire. (Tr. 21.) Prior to the arrest, he heard the defendant say to Shaw words "to the effect that he [Biller] would get back in

touch with them [the Shaws] and that he would take care of things with the insurance company, not the exact quote, but that was the content of the remarks." (Tr. 24-25.) After Inspector Toscano informed the Shaws that Biller did not have a license, Willa Shaw, according to Howard, asked the defendant to tear up the documents. (Tr. 29-31; 33-5.) While the defendant was tearing up the documents, Howard said he talked with Shaw:

> A [BY OFFICER HOWARD] I asked Mr. Shaw what had transpired between him and Mr. Biller? [sic]
>
> Q [BY MR. DOW] Un huh.
>
> A And Mr. Shaw represented to me that Mr. Biller had approached him and had purported himself to be a public adjustor and that Mr. Biller would take care of all the dealings between Mr. Shaw and the, and whatever insurance company was involved.
>
> Q Are you sure that Mr. Shaw did not

say that Mr. Biller would contract with a public adjustor?

A Mr. Shaw, without my having said beforehand, used the word quote unquote public adjustor.

Q You are certain of that?

A Yes, sir.

Q Now, can you tell us where Willa Shaw was when that statement was uttered?

A Willa was engaged at that time in her request to have Mr. Biller rip up the form. (Tr. 31.)

That Shaw said the words "public adjustor" and little else is made clear by defense counsel's effort in the following exchange:

Q Let me ask it this way. At any time did Mr. Shaw indicate to you with any degree of certainty whatsoever, whether or not Mr. Biller represented himself to be a public adjustor?

A Mr. Shaw said the words "public adjustor." (Tr. 45.)

To summarize, the evidence at the hearing on the motions to dismiss and

suppress established that (1) Inspector Toscano, the ranking officer who ordered the arrest, did not understand the law; (2) the police saw a transaction at the scene of a fire which, by the very documents themselves, was legal; (3) the defendant tore up the documents at the request of Willa Shaw; (4) the defendant said to the officers when they approached "I know who you are;" (5) Shaw said the defendant used the words "public adjustor;" (6) Shaw said words to the effect that the defendant represented himself as a public adjustor, all verbs in the past tense; (7) the defendant had been a public adjustor, past experience which may have added to the credentials of a contractor-appraiser specializing in fire damage; (8) Inspector Toscano knew the defendant had been a

public adjustor; and (9) the defendant was not, at the time of the Shaw transaction, a licensed public adjustor.*

The fact that the police chose to proceed without a warrant must be emphasized. This Court has expressed its strong preference that law enforcement officers obtain a warrant, if possible, before detaining a person suspected of a crime. E.g., Wong Sun v. United States, 371 U.S. 471, 479 (1963); Beck v. Ohio, 379 U.S. 89, 96 (1964). The warrant process interposes an orderly procedure between the desires of the police to make arrests and the privacy and liberty of citizens.

The warrant process avoids the

---

* The defense attempted to call Wilken Shaw at the hearing, but the trial court sustained the State's objection.

difficult problem of litigating after-the-fact whether a violation occurred. It prevents officers and magistrates alike from being "subtly influenced by the familiar shortcomings of hindsight judgment." Beck v. Ohio, 379 U.S. 89, 96 (1964). Although the Fourth Amendment permits warrantless arrests in public places, United States v. Watson, 423 U.S. 411 (1976) that warrantless action must be supported by probable cause. The preference for warrants means that, in a close case, the fact that the officers proceeded without a warrant may result in a finding of illegality. United States v. Ventresca, 380 U.S. 102, 106 (1965)(in a "doubtful or marginal" case a warrant may be sustained where without one it would fail).

To have arrested the defendant for public adjusting without a license, an unclassified misdemeanor, Inspector Toscano and Officer Howard were required to have probable cause for believing under the totality of the circumstances that Biller was violating §38-71 at the time they arrested him. Reasonable suspicion that a crime has occurred, no matter how well justified, is not sufficient to support an arrest.

Probable cause exists when known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that an offense has been or is being committed. E.g., Carroll v. United States, 267 U.S. 132, 161-62 (1925); Wong Sun v. United States, 371 U.S. 471, 479 (1963). As this Court in Wong Sun said,

"suspicion...[cannot] be transformed into probable cause for arrest by reason of ambiguous conduct which the arresting officers themselves have provoked." 371 U.S. at 484. Furthermore, the probable cause test is an objective one. This Court has said repeatedly that the facts must be such as to warrant belief by a "prudent man," Henry v. United States, 361 U.S. 98, 102 (1959).

Applying these standards to the evidence offered at the hearing on the motions to dismiss and suppress, it is clear that reasonable, prudent, cautious police officers would not have probable cause to arrest Biller for violating §38-71. Shaw would, in all likelihood, never have mentioned the words "public adjustor" had the police officers not put

those words into his mind by asking Biller for his license in the first place. That aside, this record does not establish Biller was acting as a public adjustor or representing himself to be one on March 12, 1981. Whenever Toscano or Howard was asked to repeat what Shaw said, in Shaw's own words, the only answer given was "public adjustor." Biller was at the scene of the fire soliciting business as a contractor-appraiser. As such, he was legally entitled to contact the insurance company to take care of that business and was legally entitled to act as an agent for the owner to retain a licensed public adjustor, which Biller Associates was. As explained earlier, Inspector Tuscano did not understand the law and thought those actions illegal. The officers'

after-the-fact attempted justification on the grounds that Shaw said that Biller represented (past tense) himself as a public adjustor is consistent with Biller having been a public adjustor, which Toscano knew. The documents admitted at the hearing all support these facts. (Hearing Exhibits A, B, C and D made Trial Exhibits A, B, 3 and C respectively.)

Even if Biller did say to Shaw "I am a public adjustor," or words to that effect, that "misrepresentation" itself would not create probable cause to believe §38-71 was being violated. The term public adjustor is defined in §38-69 as one who either (1) practices as a business the adjusting of fire damage under an insurance policy on behalf of the insured; or (2) advertises or solicits business as such

adjustor; or (3) holds himself out to the public as engaging in such adjusting as a business. Thus, to be a public adjustor, a person must either be representing an insured before an insurance company, soliciting public adjusting business as an adjustor or making representations as an adjustor to the public at large. There is no suggestion the defendant did anything remotely related to representing an insured before an insurance company, nor is there any evidence that the defendant held himself out to the general public as an adjustor. The only argument the State can make is that the defendant was soliciting business as an adjustor. But like the other two definitions, there is no evidence from which the police could conclude the defendant was soliciting public adjusting

business for himself either. All the evidence points squarely to the fact that the defendant was soliciting contracting-appraising business only, the adjusting business expressly to be done by others. A contractor who says "I am a public adjustor" while soliciting contracting business is not soliciting public adjusting business for himself, and therefore is not violating §38-71 or §38-69.

An example may help to clarify the argument. Assume I have gone into the contracting business and no longer have my license to practice law. Assume further that I solicit contracting business and in the process tell the prospective customer that I am a lawyer. The question would be not whether I solicited contracting business, nor whether I misrepresented

myself as a lawyer, but whether I solicited legal business by saying I was licensed to practice law. There is nothing in this record from which a reasonable prudent police officer could have concluded the defendant was soliciting public adjusting business for himself. The defendant was soliciting contracting business only, and would, as agent, hire others to do the adjusting.

Until such time as the Connecticut legislature makes it illegal for an owner to delegate to another the right to hire a public adjustor, any person may solicit the business the defendant sought in this case, just as a property management firm solicits the management business, and agrees as agent for the owner to place the insurance. The defendant's use of the words "I am a

public adjustor," therefore, could have been, at most, misrepresentation. No one in this case, however, claims Inspector Toscano or Officer Howard had grounds for that type of an arrest, and the documents themselves belie any such argument.

This arrest was surrounded with problems. The defendant's conduct was more consistent with legal behavior than illegal. Sections 38-71 and 38-69 had not been interpreted in reported decisions. Thus, the situation cried out for a pre-arrest judicial interpretation through the warrant process, rather than the post-arrest after-the-fact justification made inevitable by the warrantless arrest. Under all the circumstances, a reasonable prudent police officer would not have concluded that the defendant committed the

crime of adjusting without a license on March 12, 1982. Because if was a fruit of an unlawful arrest, the evidence seized from the defendant's person during this illegal arrest should have been suppressedas a matter of federal constitutional law.

CONCLUSION

For the foregoing reasons this Court should grant the petition for writ of certiorari.

Respectfully submitted,

By_____

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Supreme Court, U.S.
FILED
MAY 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1834

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

MEYER BILLER,

Petitioner

v.

STATE OF CONNECTICUT,

Respondent.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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May , 1986

EDITOR'S NOTE

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TABLE OF CONTENTS

APPENDIX A
ORDER ON PETITION FOR CERTIFICATION
TO APPEAL.....App. 2

State v. Meyer Biller, 5 Conn. App.
616 (1985).....App. 3

ORDER ON MOTION TO REARGUE.....App. 13

State v. Meyer Biller, 190 Conn.
594, 462 A.2d 907 (1983).....App. 14

MEMORANDUM OF DECISION OF MOTION
TO DISMISS.....App. 42

MOTION IN LIMINIE AND ORDER.....App. 53

MOTION TO SUPPRESS EVIDENCE AND
ORDER.....App. 58

Excerpt from Petition for Certifi-
cation.....App. 61

Excerpt from Brief of Defendant on
Appeal to the Appellate Court of
the State of Connecticut.....App. 66

SUPREME COURT

STATE OF CONNECTICUT

No. PSC-85-1083

STATE OF CONNECTICUT

V.

MEYER BILLER

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the defendant for certification to appeal from the Appellate Court (5 Conn. App. 616) it is hereby ordered that said petition be, and the same hereby is denied.

BY THE COURT,

/s/
Assistant Clerk-
Appellate

DATED: March 6, 1986

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602, 608, 478 A.2d 994 (1984); *State* v. *Festo*, 181 Conn. 254, 259, 435 A.2d 38 (1980); *In re Juvenile Appeal (85-2)*, 3 Conn. App. 184, 193, 485 A.2d 1362 (1985). The general rule is that witnesses must state facts and not their individual opinions and conclusions. *State* v. *Palozie*, 165 Conn. 288, 297, 334 A.2d 468 (1973); *Sydleman* v. *Beckwith*, 43 Conn. 9, 11 (1875); *Moody* v. *Pinto*, 37 Conn. Sup. 786, 788, 436 A.2d 1099 (1981).

The facts construed most favorably toward sustaining the verdict indicate that the manager had no ear problems prior to the altercation with the defendant. Her symptoms developed immediately after the attack and persisted for the four months prior to trial. During the trial, she continued to undergo treatment for blockage to her inner ear, which she attributed to having been punched in the face by the defendant. The jury could reasonably infer that this problem was caused by the defendant's assault and that the victim suffered a "serious impairment of health or serious loss or impairment of the function of any bodily organ." General Statutes § 53a-3 (4).

The defendant's claim that she had been deprived of effective assistance of counsel is without merit.

There is no error.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MEYER BILLER
(2073)

SPALLONE, DALY and BIELUCH, Js.

The defendant, who had been seen by a police arson inspector exchanging documents with the owner of certain New Haven premises in which a fire had occurred and who was placed under arrest for acting as a public adjuster without a license, was charged, further, with the crime of interfering with an officer after he resisted the efforts of the police to search his pockets. On the defendant's appeal from his conviction of interfering with an officer, *held*:

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1. The defendant's claims that the trial court should have dismissed the information against him because of the illegality of his initial arrest, that that court erred in refusing to admit evidence of that illegality at the hearing on his motion to dismiss and that the police were not in the performance of their duties at the time of his alleged interference were without merit since the legality of a police officer's conduct is not an element of the crime of interfering with an officer.
2. The defendant's claim that his actions did not amount to a material interference with the performance of the duties of the arresting officers was unavailing; there was sufficient evidence presented to allow the jury to decide whether he had interfered with the officers.
3. The defendant's claims that the court erred in its instructions to the jury were without merit.
4. The defendant's claim to the contrary notwithstanding, the state's closing argument did not contain facts which were not in evidence.
5. The trial court did not err either in ruling that evidence of the defendant's prior conviction of the crime of falsely certifying as to the administration of an oath could be admitted to impeach his credibility if he were to testify, or in taking that evidence into consideration at the time of sentencing; although his conviction was the subject of a pending appeal, a trial court may, in its discretion, admit evidence of a prior conviction despite the pendency of an appeal.
6. The trial court did not err in refusing to strike the testimony of one of the state's witnesses; although a recorded statement given by that witness to the police could not be produced by the state, the prejudice to the defendant did not, under the circumstances here, warrant a reversal of his conviction.

Argued October 11—decision released December 17, 1985

Information charging the defendant with the crimes of acting as a public adjuster without a license, in count one, and interfering with an officer, in count two, brought to the Superior Court in the judicial district of New Haven, geographical area number six, and tried to the jury before *W. Sullivan, J.*; after the court declared a mistrial as to count one, verdict and judgment of guilty on count two, from which the defendant appealed to this court. *No error.*

M. Mitchell Morse, for the appellant (defendant).

Christopher Malany, special deputy assistant state's attorney, with whom, on the brief, were *John Waddock* and *Carl Schuman*, assistant state's attorneys, for the appellee (state).

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BIELUCH, J. This appeal arises out of the defendant's conviction, after a jury trial, on a charge of interfering with an officer in violation of General Statutes § 53a-167a. The defendant has raised eight claims of error with regard to his conviction. We find no error.

The jury could reasonably have found the following facts. On March 12, 1981, a fire took place at a house owned by Wilken Shaw located at 79 Hallock Street in New Haven. At the scene of the fire, Joseph Toscano, an arson control assistant inspector assigned to the office of the New Haven State's Attorney, saw the defendant approach Shaw and his daughter-in-law, Willa Shaw. Toscano watched as the defendant spoke to the Shaws and provided them with some documents which Wilken Shaw signed. Toscano then approached the defendant and the Shaws with another officer, Joseph Howard. As the officers approached the trio, they heard the defendant state to the Shaws that he would contact the insurance companies.

Toscano identified himself to the defendant who responded by acknowledging that he knew Toscano's identity. Toscano then asked the defendant if he was licensed to act as a public adjuster in this state. Toscano also, at that time, saw the documents which Shaw had signed. He believed that one of those documents was a retainer for the services of a public adjuster. Because he knew that the defendant no longer was licensed as a public adjuster, Toscano ordered the defendant's arrest for violating General Statutes § 38-71, which prohibits acting as a public adjuster without a license.

At some time during these events,[1] the defendant tore up certain documents which Shaw had signed and placed the pieces in his pocket. After the arrest,

[1] Because the specific timing of this event is important and is not sufficiently established, we cannot clarify this sequence of events any further. In view of our holding, such further clarification is unnecessary.

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Howard handcuffed the defendant. When the officers attempted to search his pockets, however, the defendant resisted this effort and struggled to prevent them from doing so. The officers then led the defendant to a police car. There, the police succeeded in entering the defendant's pockets and retrieving the remnants of the torn documents.

The defendant was charged with violation of General Statutes § 38-71, acting as a public adjuster without a license, and of General Statutes § 53a-182, disorderly conduct. By substitute information, the second count was changed to interfering with a police officer in violation of General Statutes § 53a-167a.[2] The defendant pleaded not guilty to both counts of the substituted information and, after a trial, the jury was unable to agree on a verdict on the first count and a mistrial was declared as to that count. The jury, however, found the defendant guilty on the second count.

I

The defendant's first three claims of error are: (1) that the court erred in denying his motion to dismiss the substituted information against him based upon his claim that his original arrest had been illegal; (2) that the court improperly restricted the evidentiary hearing on the motion to dismiss so as to prevent the defendant from presenting evidence which would have demonstrated that the police originally lacked probable cause to arrest him; and (3) that because they were acting illegally, the police were not in the performance of their duties as required by General Statutes § 53a-167a. We find these claims to be without merit.

At the outset, we note that the defendant does not appeal from the mistrial declared on the first count of

[2] General Statutes § 53a-167a (a) provides: "A person is guilty of interfering with an officer when he obstructs, resists, hinders or endangers any peace officer or fireman in the performance of his duties."

000006

the information lodged against him. Only the charge upon which he was convicted and sentenced is at issue here. Since we conclude that the illegality of the defendant's initial arrest is not, per se, a defense to the charge of interfering with an officer, these claims of error must fail.

In *State* v. *Privitera*, 1 Conn. App. 709, 476 A.2d 605 (1984), this court held that "the legality of the police officer's conduct is not an element of the crime defined by General Statutes § 53a-167a (a), and that, in a prosecution under that statute, to the extent that the state's case is based on the conduct of a police officer in making an arrest, by virtue of General Statutes § 53a-23 the illegality of that arrest is not a defense [to that charge]." Id., 719. But even more so here, the defendant's conviction pursuant to the same statute as in *Privitera* bears no fundamental relationship to the legality of his initial arrest. Rather, it is his conduct after arrest which supported this charge and is at issue.

Our holding by no means renders any and all police misconduct irrelevant. A violation of General Statutes § 53a-167a only occurs when interference with the officer is "in the performance of his duties." "If [the officer] is acting under a good faith belief that he is carrying out that duty, and if his actions are reasonably designed to that end, he is acting in the performance of his duties." *State* v. *Privitera*, supra, 722. Thus, the question is not whether there was probable cause for the defendant's original arrest, or whether that arrest was otherwise illegal. The test is whether the officer is acting in good faith within the scope of his duties as an officer or is pursuing a personal intent or frolic of his own. Id. Thus, in the present case, the lack of probable cause to arrest the defendant on the original charges was irrelevant to the court's jurisdiction over his prosecution for violation of § 53a-167a, and his motion to dismiss this charge was properly denied.

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Similarly, the court's failure, at the hearing on the motion to dismiss the information, to admit further evidence on the issue of the officers' probable cause to arrest the defendant cannot be found to be improper, since such evidence was irrelevant to the court's jurisdiction over the charge now on appeal.

II

The defendant next claims that his actions in preventing the police from searching his pockets immediately after his arrest did not amount to a material interference with the performance of the duties of those officers. We disagree.

The defendant's argument is, essentially, that by his actions, he merely delayed the officers' search of his pockets until he was away from the public spotlight at the scene of the fire. That, he argues, does not constitute interference with the performance of the officers' duties, but merely with the timing thereof. We see no meaningful distinction in this case. The defendant's argument seems to be that unless he successfully prevented the police from obtaining the torn documents from his pockets, he merely attempted to interfere with the police, at best. General Statutes § 53a-167a, however, defines "interfering" to include obstruction, resistance, hindrance or endangerment. To "obstruct" is defined as "to be or come in the way of: hinder from passing, action, or operation." To "resist" is defined as "to withstand the force or the effect of: be able to repel or ward off." To "hinder" is defined as "to make slow or difficult the course or progress of." "Endangerment" is defined as "the act of placing in danger or the state of being placed in danger." Webster, Third New International Dictionary. At the very least, the delay caused to the officers in this case was sufficient to raise a jury question regarding whether there had been an interference in violation of General Statutes § 53a-167a.

III

The defendant next claims that the court erred in its charge to the jury. He claims that the court erred in four respects in charging the jury on the elements of General Statutes § 53a-167a and in referring to General Statutes § 53a-23, which abrogates the common law right to resist an illegal arrest. We have carefully reviewed the defendant's exceptions to the charge and we conclude that they are without merit. "In considering a charge, critical dissection is not required. The charge as a whole must be considered from the standpoint of its effect on the jury in guiding them to a proper verdict." *State* v. *Taxiltaridis*, 2 Conn. App. 617, 620, 481 A.2d 98 (1984). The test must be whether "the court's instructions, taken as a whole, fairly and adequately presented the case in such a way that injustice was not done to either party under the established rules of law." Id. We conclude that the defendant's claims are based on a narrow reading of brief excerpts from the charge which are taken out of context and do not do justice to the parties. In this manner, the defendant incorrectly characterizes as error the court's proper and complete guidance of the jury to its verdict.

IV

The defendant next claims that the court erred in permitting the prosecutor to argue, in his closing remarks to the jury, facts which were not in evidence. This claim is made despite the defendant's failure to object to those remarks at trial[3] and despite his own prior statement

[3] Counsel asserts that any such objection would have been futile and that he was, therefore, not obligated to object. *Grant* v. *Pagter*, 133 Conn. 646, 649, 53 A.2d 380 (1947); *Tracy* v. *O'Neill*, 103 Conn. 693, 699, 131 A. 417 (1925). He further asserts that because this error rises to the level of a violation of constitutional rights, the failure to object should be excused pursuant to *State* v. *Evans*, 165 Conn. 61, 71, 327 A.2d 576 (1973). Because we find no colorable claim, as alleged, of violation of a fundamental constitutional right, we need not consider *Evans* further.

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to the jury which was to the same effect as that to which he now objects. The factual argument which the defendant raises by this issue was the prosecutor's comment that the defendant "tore up the documents *when the police officers wanted them.*" (Emphasis added.) This statement was made by the prosecutor in paraphrase of a written statement in evidence which Wilken Shaw had given to a private investigator for the defendant. That written statement was that "the men wanted the form he had, but, he tore it up rather than give it to them." We conclude that the prosecutor's comment was an accurate and unobjectionable paraphrasing of the original written statement given by Wilken Shaw to the defendant's investigator. His rephrasing of the evidence was proper summation or argument to the jury.

V

The defendant's penultimate claim is that the trial court erred in ruling, in response to the defendant's motion in limine, that his prior conviction on two counts of falsely certifying as to the administration of an oath, a violation of General Statutes § 53-368, could be admitted into evidence for the purpose of impeaching the defendant's testimony if he chose to testify. This claim is based on the fact that these convictions were the subject of an appeal at the time when the trial court ruled on the defendant's motion.[4] We conclude that the trial court did not err here.

The trial court, in its discretion, may admit evidence of a prior conviction for impeachment purposes despite the pendency of an appeal. *State* v. *Schroff*, 3 Conn. App. 684, 689, 492 A.2d 190 (1985). The court must, however, also permit defense counsel to point out the

[4] We note at the outset that this motion was repeated at the close of the defendant's case and was then denied a second time. The record indicates that it was only at the time of this second motion that the appeal was disclosed to the court.

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pending appeal to the jury. Id. Thus, in the present case, it was not error to deny the defendant's motion in limine.

The defendant has also argued that the use of the convictions then on appeal as a factor in his sentencing was improper. In addition to our conclusion above, that the use of those convictions for impeachment was proper, we hold that their use in sentencing was also proper. The trial court has broad discretion in sentencing and in the absence of an abuse of that discretion, we will not reverse the sentence imposed. *State* v. *Rose*, 168 Conn. 623, 638, 362 A.2d 813 (1975). In the present case, the trial court only acknowledged that the "[t]wo felony convictions in the past even though they are on appeal, must be considered." We cannot conclude that the trial court's use of those convictions in sentencing was an abuse of discretion.

VI

Finally, the defendant claims that the court erred in denying his motion to strike the testimony of Wilken Shaw after the state failed to produce a recorded statement given by Shaw to the police. The state produced a transcript of the recorded statement, asserting that the recording itself had been erased in accord with New Haven police department policy. The defense, however, claimed that this was insufficient compliance with Practice Book §§ 748 through 755. Thus, the defense moved, pursuant to § 755, that the testimony of Shaw be stricken or that, in the alternative, a mistrial be declared. The court denied that motion. In this we also find no error.

Whether sanctions should be imposed for nondisclosure in a given case, such as the present one, requires the weighing of the state's culpability in failing to produce the statement against the amount of prejudice incurred by the defendant due to the loss of

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the statement. *State* v. *Myers*, 193 Conn. 457, 467, 479 A.2d 199 (1984); *State* v. *Shaw*, 185 Conn. 372, 386, 441 A.2d 561 (1981), cert. denied, 454 U.S. 1155, 102 S. Ct. 1027, 71 L. Ed. 2d 312 (1982); *State* v. *Zayas*, 3 Conn. App. 289, 295–96, 489 A.2d 380 (1985). We must agree with the court in *State* v. *Myers*, supra, which concluded that the erasure of the recording by the police, in circumstances similar to those in the present case, was unexcused. Id., 469. We also note, however, that the court in *Myers* found that the prejudice to the defendant arising from the erasure did not warrant a reversal of the conviction, and we reach the same conclusion here.

A transcript of Shaw's recorded testimony, signed by him, was offered to the defense in lieu of the recording itself. The defense claimed that this transcript was insufficient and moved for permission to conduct a voir dire examination of Howard who had already testified and who had recorded the statement from Shaw. The trial court denied that motion but encouraged the defendant to cross-examine Shaw regarding whether the transcript accurately reflected the recorded statement he had previously given. The court further ordered the state to make available to the defendant the person who had transcribed the statement from the recording. The defense did not avail itself of either of these opportunities. Under these circumstances, we cannot conclude that the court erred in denying the defendant's motion to strike Shaw's testimony. Granting such a motion "would be a heavy sanction to the government for loss of a piece of evidence on which there was other primary evidence." *State* v. *Shaw*, supra, 386, citing *United States* v. *Miranda*, 526 F.2d 1319, 1324 (2d Cir. 1975), cert. denied, 429 U.S. 821, 97 S. Ct. 69, 50 L. Ed. 2d 82 (1976).

There is no error.

In this opinion the other judges concurred.

000312

NO. A.C. 2073

STATE OF CONNECTICUT : APPELLATE COURT

v. : STATE OF CONNECTICUT

MEYER BILLER JANUARY 29, 1986

O R D E R

The motion of the defendant filed December 26, 1985, to reargue,

Having been presented to the Court, it is hereby

O R D E R E D Denied.

BY THE COURT,
FRANCIS J. DRUMM, JR.
Chief Clerk

Assistant Clerk-
Appellate

Notice sent: 1/29/86

000013

discretion." (Citations omitted.) *State* v. *Briggs*, 179 Conn. 328, 332-33, 426 A.2d 298 (1979), cert. denied, 447 U.S. 912, 100 S. Ct. 3000, 64 L. Ed. 2d 862 (1980); see also *State* v. *Miller*, 186 Conn. 654, 670-71, 443 A.2d 906 (1982); *State* v. *Hogan*, 180 Conn. 182, 183, 429 A.2d 462 (1980). At the same time, a trial court should take care to prevent the introduction of evidence that has little or no probative value and which would reasonably tend to inflame the jury. See *State* v. *Hogan*, supra; *State* v. *Onofrio*, 179 Conn. 23, 32-33, 425 A.2d 560 (1979); *State* v. *Runkles*, 174 Conn. 405, 413, 389 A.2d 730, cert. denied, 439 U.S. 859, 99 S. Ct. 177, 58 L. Ed. 2d 168 (1978).

In the present case, Coles testified that she placed her children in foster homes because she "wasn't financially and mentally able to take care of them, at that point in my life." The witness' mental competency was clearly relevant to her credibility. Therefore, while testimony regarding the placement of one's children in foster homes might be more prejudicial than probative in some instances, we cannot conclude that the court abused its discretion in ruling as it did. *State* v. *Miller*, supra; *State* v. *Martin*, 170 Conn. 161, 166, 365 A.2d 104 (1976).

There is no error.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MEYER BILLER
(9727)

SPEZIALE, C. J., PETERS, PARSKEY, SHEA and GRILLO, Js.

The defendant notary public, convicted of falsely certifying that he had administered oaths (§ 53-368) on two insurance company proof of loss forms, appealed. *Held:*

1. The trial court erred in admitting into evidence certain statements made by the defendant to a one-man investigative grand jury, those statements having been compelled in violation of his fifth amendment privilege against self-incrimination.

000014

2. The trial court did not err in determining that the oaths which the defendant falsely certified that he had administered were "required by law," a prerequisite to a conviction under § 53-368.

(One judge dissenting)

3. The defendant's claim that he was deprived of his sixth amendment right to counsel by the trial court's admission into evidence of tape recorded conversations he had had with a police informant following his earlier arrest on charges of criminal mischief and of aiding larceny was not persuasive; one charged with one offense is not immunized from accountability for statements he subsequently makes which tend to prove another offense.

4. The trial court did not err in refusing, on the ground that a proper foundation had not been laid, to admit into evidence certain expert testimony proffered by the defendant.

Argued March 8—decision released July 5, 1983

Information charging the defendant with two counts of the crime of falsely certifying as to the administration of an oath, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Schaller, J.*; verdict and judgment of guilty and appeal by the defendant to this court. *Error; new trial.*

M. Mitchell Morse, with whom, on the brief, were *Howard A. Jacobs* and *Karen F. Tross*, for the appellant (defendant).

Julia D. Dewey, assistant state's attorney, with whom, on the brief, were *Arnold Markle*, state's attorney, and *Mary M. Galvin*, assistant state's attorney, for the appellee (state).

PARSKEY, J. The defendant, Meyer Biller, a licensed public adjuster and a notary public, was charged in a two-count information with falsely certifying two oaths in violation of General Statutes § 53-368. The case was tried to a jury and the defendant was found guilty on both counts. The court imposed consecutive eighteen month to three year sentences on each count for a total

000015

effective sentence of not less than three, nor more than six years, from which judgment the defendant has appealed.

Although the testimony was contradictory, the jury could reasonably have found the following facts: On April 13, 1975, and April 18, 1975, suspicious fires heavily damaged an apartment building located at 66-68 Norton Street in the city of New Haven. The property was an asset of the Bridgehaven Corporation, a closely held corporation controlled by Peter and Marilyn Cappola.

Peter Cappola, a key state's witness, had insured the property for approximately $580,000. Prior to the date of the fires, the Cappolas had retained the defendant for the purpose of settling claims with insurance companies. Also prior to the date of the April 13, 1975 fire, Peter Cappola advised Biller that a fire would in fact occur. Cappola admitted setting the April 13, 1975 fire, but denied any involvement in the April 18, 1975 fire.

Biller proceeded to adjust claims arising out of both fires. He and his son, Lawrence Biller, prepared a detailed survey itemizing the damage and replacement costs. Before the expiration of the deadline for filing proofs of loss with the insurance company, Biller provided Peter Cappola with two proof of loss forms and instructed Cappola to take them home and get his wife's signature. Cappola took the forms home. There the Cappolas signed one blank form for each fire. These signed but otherwise blank forms were then submitted to the defendant's office. The Cappolas were unaware of the amounts claimed in the proofs of loss until after their submission to the insurer. Neither Peter nor Marilyn Cappola took an oath concerning the claims submitted.

000016

Gerald Hale, the insurance company adjuster, received the proofs with a cover letter from the defendant and sent them on to the insurer. When Hale received the proof of loss statements, they were completely filled in with no blank lines remaining on the forms. The forms were signed by the defendant as a notary. The damages claimed were $538,180.58 for the April 13 fire and $123,206.60 for the April 18 fire. Hale, who had examined the Norton Street structure soon after both fires and on subsequent occasions, considered the claims excessive. It was Hale's opinion that $225,000.00 and $75,000.00 were proper figures for the first and second fires respectively. Additionally there was evidence that the defendant had inflated the figures by twenty percent and that he had charged a fee of ten percent of the settlement.

The defendant has pressed seven claims of error on appeal. At issue is (1) whether the trial court erred in admitting into evidence, for the purpose of rebuttal, statements allegedly compelled from the defendant by an investigative grand jury; (2) whether the oath on a proof of loss form is one required by law as is necessary to sustain a conviction pursuant to General Statutes § 53-368; (3) whether the defendant's right to counsel was violated when the police secretly recorded his conversations after he had been arrested and had retained counsel for other charges arising out of the same grand jury investigation; (4) whether testimony offered by the defendant concerning structural replacement cost was properly excluded from evidence; (5) whether evidence of the usual practice within the insurance industry regarding damage estimates offered by the defendant was properly excluded; (6) whether the court erred in restricting the defendant's cross-examination of two government witnesses and (7) whether the court properly charged the jury.

000017

I

The defendant claims that the trial court erred in admitting into evidence, for the purpose of rebuttal, statements allegedly compelled from the defendant by an investigative grand jury.

In contradiction of the testimony of Marilyn and Peter Cappola, the defense offered the testimony of Florence Biller and Lawrence M. Biller (the defendant's wife and son), corroborated in part by other witnesses. Lawrence Biller testified that the Cappolas signed duplicate sets of proofs of loss at the defendant's office where the defendant notarized them. On cross-examination, Lawrence Biller was questioned about the ordinary course of business at Biller Associates concerning the filling out and execution of proofs of loss. He stated that they ordinarily filled out an original plus one — one for the insurance company and one for their records. He denied that it was the usual course to have them filled out, including the notary date, prior to signing and stated that the Cappola proofs had been filled out except for the date, before signing.

The state, in rebuttal, offered two excerpts[1] from the defendant's testimony before Judge Levine sitting as

[1] The defense had offered testimony in contradiction of Peter and Marilyn Cappola. Thereafter, in rebuttal, the state introduced, over objection and exception, two statements made by the defendant when he testified before an investigating grand jury. The statements, in the form of excerpts from the grand jury transcript, were introduced as a state's exhibit and were as follows:

(3/3/76)

"Q. So was it common procedure for the corporation, I'm asking you, Sir, to get blank proof of losses signed not indicating for what date or what area or what type of occurrence?

"A. It happens."

(3/4/76)

"Q. Do you normally have Proofs of Loss that are unfilled in signed by the insured and acknowledged by you?

"A. Mr. Markle, I don't normally have anything. I do things many

000018

a one man grand jury investigating incidents of arson in the New Haven area. The defendant had been subpoenaed to the grand jury to produce his corporate records.[2] Biller appeared before the grand jury on nine different days between October 9, 1975, and March 12, 1976. When questioned about his own activities on behalf of the corporation, Biller asserted his constitutional privilege against self-incrimination. The grand juror ordered him to answer the questions because they involved actions which the defendant might have taken in a corporate capacity regardless of whether the answers would implicate the defendant personally. This ruling was established by Judge Levine on the defendant's first day of testimony before the grand jury and was reaffirmed on every subsequent day of testimony up to and including March 2, and March 4, when the defendant gave the statements that were later introduced at trial.

On appeal the defendant claims that the trial court erred in admitting statements allegedly compelled from the defendant by the investigative grand jury in violation of his fifth amendment rights. In his brief the defendant adopts a two stage analysis. First, the defendant asserts that the grand juror erred when he ordered Biller to give incriminating testimony about his own activities on behalf of the corporation; and second, the defendant argues that the trial court erred in finding that the admitted statements were not involuntary or compelled under the circumstances.

The state does not seriously challenge the first step of the defendant's analysis. The state contends, however, that the defendant waived his fifth amend-

different ways. The only purpose of the way I work and do things is from my memory, from my recollection, from my records, and for me to know and for my purposes, not for any other purpose."

[2] Biller Associates is a close corporation. At the time of the grand jury investigation the defendant was the president of the corporation.

000019

ment right by failing to raise the privilege prior to giving the statements that were later introduced at trial. The state does not concede that the grand juror's alleged error necessarily rendered the defendant's statements inadmissible at trial.

The privilege against compulsory self-incrimination extends to proceedings before a grand jury. *State* v. *Kemp*, 126 Conn. 60, 72, 9 A.2d 63 (1939). The federal fifth amendment standards were made applicable to the states in *Malloy* v. *Hogan*, 378 U.S. 1, 11, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); *State* v. *Simms*, 170 Conn. 206, 209, 365 A.2d 821, cert. denied, 425 U.S. 954, 96 S. Ct. 1732, 48 L. Ed. 2d 199 (1976). "[The fifth amendment] can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosure that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar* v. *United States*, 406 U.S. 441, 444-45, 92 S. Ct. 1653, 32 L. Ed. 2d 212, reh. denied, 408 U.S. 931, 92 S. Ct. 2478, 33 L. Ed. 2d 345 (1972).

That a corporation has no fifth amendment privilege is long established and is not disputed here. See *Hale* v. *Henkel*, 201 U.S. 43, 26 S. Ct. 370, 50 L. Ed. 652 (1906). Nor is it seriously questioned that the grand juror erred when he compelled the defendant to answer questions in his "corporate capacity" where the answers may have been personally incriminating to the defendant. The determinative law was enunciated by the United States Supreme Court in *Curcio* v. *United States*, 354 U.S. 118, 77 S. Ct. 1145, 1 L. Ed. 2d 1225 (1957).[3] Therein, the court stated that "A custodian,

[3] In *Curcio* v. *United States*, 354 U.S. 118, 77 S. Ct. 1145, 1 L. Ed. 2d 1225 (1957), the United States Supreme Court reversed a contempt conviction holding that the custodian of a union's books and records who had failed to produce them before a federal grand jury pursuant to a subpoena, could, on fifth amendment grounds, lawfully refuse to answer questions asked by the grand jury as to the whereabouts of the books and records. See *United States* v. *Rylander*, 460 U.S. 752, 103 S. Ct. 1548, 75 L. Ed. 2d 521 (1983).

000020

by assuming the duties of his office, undertakes the obligation to produce the books of which he is custodian in response to a rightful exercise of the State's visitorial powers. But he cannot lawfully be compelled, in the absence of a grant of adequate immunity from prosecution, to condemn himself by his own oral testimony." Id., 123-24. The court, citing *Wilson* v. *United States*, 221 U.S. 361, 385, 31 S. Ct. 538, 55 L. Ed. 771 (1911), further noted that: " 'They [the custodians of corporate records] may decline to utter upon the witness stand a single self-criminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers.' " (Bracketts in original.) Id., 124. The defendant as the president of Biller Associates had voluntarily assumed a duty which overrode his claim of privilege *only* with respect to the production of the corporate records themselves. The grand juror, therefore, erred by compelling incriminating oral testimony from the defendant in his "corporate capacity."

We turn now to the second stage of the defendant's analysis. The defendant claims that the trial court erred in admitting statements compelled from him by the grand jury in violation of his fifth amendment rights. The state claims that the defendant waived his fifth amendment privilege by failing to raise it by objection prior to giving the two statements that were later admitted at trial. The trial court found that the defendant's statements were not involuntary or compelled under the circumstances.

Based on our examination of the grand jury transcript, it is indisputable that Biller raised his fifth amendment privilege on numerous occasions during the course of his testimony. Further, it is indisputable that

the grand juror continuously sustained the privilege personally but ordered Biller to answer in his "corporate capacity."[4] Although only two brief excerpts of

[4] The following excerpts are typical of what transpired throughout Biller's grand jury testimony:

(10/16/75)

"The Court: Well, as I understand the issue which Mr. Markle is raising this, in his corporate capacity there exists no privilege, am I correct? Is that your argument?

"Mr. Markle: Yes, your Honor.

"The Court: In the corporate capacity, there is no privilege which exists for records, certainly, and for any action which he may have taken in the corporate capacity."

(3/2/76)

"[By Mr. Markle:] Did you have a conversation with Nardini about burning George Street?

"[Mr. Biller:] I won't answer that.

"Q. Did you ever have a conversation with Nardini in your corporate capacity as to how George Street had come to be burned?

"A. I won't answer that, Your Honor. That would reflect on individual integrity and everything else and I will repeat, as I said before, it's a closed corporation, the operation and intermingling between personalities, corporate is so fine a line that anything that can be possibly be interpreted to be incriminating in any way, I would invoke the Fifth Amendment.

"The Court: Yes. Well, you're not allowed to invoke the Fifth Amendment on behalf of the corporation. The question is asked on behalf of the corporation. You will have to answer it.

"The Witness: Then the corporation will have to speak for itself.

"The Court: You're the corporation, you speak for it.

"The Witness: I'm an employee.

"The Court: As far as you know, did the corporation ever have a discussion with Mr. Nardini with respect to burning George Street?"

(3/3/76)

"Q. In terms of those two checks, Mr. Biller, did the corporation pay $5,500 to Mr. Grudberg? What business did it have with Mr. Grudberg, the corporation?

"A. Your Honor, I again would take the Fifth Amendment on behalf of the corporation unless the State's Attorney can show that it's germane to this investigation.

"The Court: Now, please, whether it's germane to the investigation is not the question. The only question that you have a right to object to is one which involves you in a crime. This is the corporation. It does not have the protection of the Fifth Amendment, therefore, you will have to answer the question.

"The Witness: Your Honor, if I might state further:

000022

Biller's testimony were later admitted at trial, our review necessarily requires that we examine the statements in context. The first question and answer incorporated in the state's exhibit occurred during Biller's testimony before the grand jury on March 3, 1976. The statement and the colloquy immediately preceding and following are set out in the footnote below.[5] During his colloquy the state's attorney ques-

"The Court: Yes, go right ahead.

"The Witness: Some transactions in that checkbook and this, for one, takes place at my personal direction, therefore I'm answerable to it personally and on that basis I will take the Fifth Amendment on answering that question.

"The Court: You take it personally. Now, you answer on behalf of the corporation, what were those checks issued for?

"The Witness: They were issued at the direction of Meyer Biller."

[5] The following is an excerpt from the defendant's testimony before the grand jury on March 3, 1976. The italicized excerpts were subsequently incorporated in an exhibit that was introduced by the state, in rebuttal, at the defendant's criminal trial.

By Mr. Markle:

"Q. The proof of loss. The statement of proof of loss. You now handed me—that's two. All right, the one statement in proof of loss. Incidentally, Sir, in this file, there are in addition to that, I want you to see—will you hold those so I can open the file. There is a statement, proof of loss on the Meyer Associates.

"A. On the Biller Associates.

"Q. I'm sorry, on the Biller Associates, Licensed Adjustor. That's signed by Mr. Nardini, proof of loss, right, as president?

"A. That's correct.

"Q. It's from your file?

"A. D J Investments, Incorporated, by Dante Nardini.

"Q. It's in your file?

"A. Correct.

"Q. What's that got reference to, what fire?

"A. I don't know.

"Q. What vandalism?

"A. I don't know.

"Q. Do you normally walk around with a blank signed proof of loss?

"A. It depends.

"Q. Is that a common practice to get a series of proof of losses signed by a client?

"A. Are you talking about the corporation obtaining them?

000023

tioned Biller about what appeared to be two signed blank proof of loss forms in a Biller Associates file. When asked about the first blank signed proof of loss, Biller claimed his fifth amendment privilege personally. The state's attorney then questioned Biller about the actions of the corporation and Biller answered. Biller was then asked as a "corporate officer" if the proof of loss came from the Biller Associates file; to which he responded affirmatively. The state's attorney then asked the question that along with Biller's answer was later introduced at trial:

"So was it common procedure for the corporation, I'm asking you, Sir, to get blank proof of losses signed not indicating for what date or what area or what type of occurrence?"

"A. It happens."

Immediately thereafter Biller was asked if it (the proof of loss) was in anticipation of something happening. Biller objected and the grand juror ordered him to answer in his "corporate capacity."

"Q. Let's take you, first, do you claim the Privilege on that?
"A. I claim the Privilege.
"Q. Now, how about the corporation?
"A. It happens.
"Q. Well, it happened here.
"A. For various reasons.
"Q. What?
"A. I see it here. There it is. It speaks for itself.
"Q. That's from your file, isn't it?
"A. It speaks for itself.
"Q. There's no question that was in the Biller Associates file?
"A. It speaks for itself. It's there.
"Q. Sir, I'm asking you as a corporate officer, is that from the Biller Associate file?
"A. You're showing me the file. It's coming out of the file. It apparently is.
"Q. And there is a second one that's blank, isn't there?
"A. Correct.
"Q. That also came out of the file?
"A. Correct.
"Q. *So was it common procedure for the corporation, [illegible] Sir.*

000024

Clearly this entire colloquy was infected by the grand juror's erroneous ruling on the applicability of Biller's fifth amendment privilege. That Biller was compelled to incriminate himself is manifest.[6] " '[A] witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. *Kastigar* v. *United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 [reh. denied, 408 U.S. 931, 92 S. Ct. 2478, 33 L. Ed. 2d 345] (1972). Absent such protection if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution. *Bram* v. *United States*, [168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568 (1897)]; *Boyd* v. *United States*, [116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886)]'; *Lefkowitz* v. *Turley*, 414 U.S. 70, 78, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973)." *Garner* v. *United States*, 424 U.S. 648, 653, 96 S. Ct. 1178, 47 L. Ed. 2d 370 (1976).

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to get blank proof of losses signed not indicating for what date or what area or what type of occurrence?

"A. *It happens.*

"Q. What is it, in anticipation of something happening?

"A. I wouldn't say that, Your Honor. I would object to that question.

"The Court: Answer that question, in your corporate capacity.

"The Witness: It's in anticipation of nothing.

By Mr. Markle:

"Q. Well, then, Sir, what purpose would two proofs of loss both signed D J Investments, Inc. by Dante Nardini, Jr., President, have in a file with nothing else indicating no number, no policy, no date, no loss?

"A. At this point, I can't tell you why that's in there. I don't recall why it was done." (Emphasis added.)

[6] Even assuming arguendo that the specific question and answer later admitted at trial were not the specific subject of a fifth amendment claim by Biller we would reach the same result. It is obvious that, at this stage of the proceeding, there was no fifth amendment claim which Biller could have made that had any prospect of being fully honored. It was perfectly clear from the previous rulings of the court that any such claim would be futile. Under the circumstances, Biller's failure to claim the privilege cannot reasonably be interpreted as a waiver. *State* v. *Higgs*, 143 Conn. 138, 145, 120 A.2d 152 (1956); see *Krause* v. *Almor Homes, Inc.*, 147 Conn. 333, 336, 160 A.2d 753 (1960).

000025

Because we find that admitting Biller's March 2 statement in his subsequent trial was error, we need not consider the admission of the March 4 statement as it was an inseparable component of the state's exhibit. Further, it is apparent that the improperly admitted evidence contradicted the testimony of the defense witnesses on one of the central issues . . the case, namely, whether the proofs of loss were signed by the Cappolas at home, in blank, or in front of the defendant in his office. Because it is evident from our examination of the record and transcript that credibility was crucial in this case; *State* v. *Ouellette*, 190 Conn. 84, 103-104, 459 A.2d 1005 (1983); we cannot say that the error was harmless.

II

By amended jury information the defendant was charged, pursuant to General Statutes § 53-368, with two counts of falsely certifying that he had administered an oath to Marilyn Cappola, on sworn statements in proof of loss filed with the Affiliated F.M. Insurance Company of Rhode Island. It was further alleged that the sworn statements in proof of loss were required by General Statutes § 38-98. In his second claim of error, the defendant asserts that the oath on the proof of loss form contemplated by the particular insurance policy involved herein is not one "required by law" necessary to sustain a conviction pursuant to General Statutes § 53-368.[7] The state maintains,

[7] "[General Statutes] Sec. 53-368. FALSELY CERTIFYING AS TO ADMINISTRATION OF OATH. Any person authorized by the laws of this state to administer oaths and affirmations, who falsely certifies that an oath or affirmation has been administered by him to any person in any matter where an oath or affirmation is by law required or falsely certifies that any affidavit, deposition or written statement of any kind required by law to be made upon oath or affirmation has been sworn or affirmed to before him by the person making such affidavit, deposition or written statement in any case where the same is required by law to be made, shall be fined not more than one thousand dollars or be imprisoned not more than three years or both."

000026

however, that sections 38-99 (a)[8] and 38-98 mandate that a proof of loss in conjunction with a fire insurance policy be signed and sworn to by the insured.

[8] In pertinent part, General Statutes § 38-99 provides:

"Sec. 38-99. PROVISIONS OF POLICY OR CONTRACT. (a) No policy or contract of fire insurance shall be made, issued or delivered by any insurer or any agent or representative thereof, on any property in this state, unless it conforms as to all provisions, stipulations, agreements and conditions with the form of policy set forth in section 38-98. There shall be printed at the head of such policy the name of the insurer or insurers issuing the policy, the location of the home office thereof, a statement showing whether such insurer or insurers are stock or mutual corporations or are reciprocal insurers or Lloyd's underwriter, provided any company organized under special charter provisions may so indicate upon its policy and may add a statement of the plan under which it operates in this state, and there may be added thereon such device or devices as the insurer or insurers issuing such policy desire. Such policy shall be clearly designated on the back of the form as "The Standard Fire Insurance Policy of the State of Connecticut"; and this designation may include the names of such other states as have adopted this standard form. The standard fire insurance policy provided for in section 38-98 need not be used for effecting reinsurance between insurers. If the policy is issued by a mutual, cooperative or reciprocal insurer having special regulations with respect to the payment by the policyholder of assessments, such regulations shall be printed upon the policy and any such insurer may print upon the policy such regulations as are appropriate to or required by its form of organization. Insurers issuing the standard fire insurance policy pursuant to section 38-98 are authorized to affix thereto or include therein a written statement that the policy does not cover loss or damage caused by nuclear reaction or nuclear radiation or radioactive contamination, all whether directly or indirectly resulting from an insured peril under such policy; provided nothing herein contained shall be construed to prohibit the attachment to any such policy of an endorsement or endorsements specifically assuming coverage for loss or damage caused by nuclear reaction or nuclear radiation or radioactive contamination.

"(b) Any policy or contract which includes, either on an unspecified basis as to coverage or for an indivisible premium, coverage against the peril of fire and substantial coverage against other perils need not comply with the provisions of subsection (a) hereof, provided (1) such policy or contract shall afford coverage, with respect to the peril of fire, not less than the substantial equivalent of the coverage afforded by said standard fire insurance policy, (2) the provisions in relation to mortgagee interests and obligations in said standard fire insurance policy shall be incorporated therein without change, (3) such policy or contract is complete as to all of its terms without reference to any other document and (4) the commissioner is satisfied that such policy or contract complies with the provisions hereof."

000027

The defendant advances three principal contentions. He argues that because the insurance commissioner can, pursuant to General Statutes § 38-99 (b), approve insurance policies not utilizing the standard form, the oath set forth in § 38-98 is not required by law. He also contends that the requirement in the standard form fire insurance policy that the proof of loss be sworn to is only a model contract provision, not a matter required by law for § 53-368 purposes and that after acceptance by the parties a policy of fire insurance in the form prescribed by the legislature is not to be treated as a legislative enactment but rather as a private contract. He contends finally that because the insurance company can waive the proof of loss requirement the oath set forth in § 38-98 is not required by law.

In order to analyze the defendant's first contention we must establish the statutory framework. Section 53-368 prohibits the false certification of an oath that is required by law. See *State* v. *Tedesco*, 175 Conn. 279, 397 A.2d 1352 (1978). General Statutes § 38-98[9] sets

[9] Section 38-98 of the General Statutes provides in relevant part:

"Requirements in case loss occurs. The insured shall give immediate written notice to this Company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claims; AND WITHIN SIXTY DAYS AFTER THE LOSS, UNLESS SUCH TIME IS EXTENDED IN WRITING BY THIS COMPANY, THE INSURED SHALL RENDER TO THIS COMPANY A PROOF OF LOSS, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be

000028

forth the standard form fire insurance policy for the state of Connecticut. Section 38-99 (a) provides, inter alia, that "[n]o policy or contract of fire insurance shall be made, issued or delivered by any insurer or any agent or representative thereof, on any property in this state, unless it conforms as to all provisions, stipulations, agreements and conditions with the form of policy set forth in section 38-98. . . ." Section 38-99 (b), however, excludes certain fire insurance policies from the ambit of §§ 38-99 (a) and 38-98, if those policies meet the requirements set forth in § 38-99 (b) to the satisfaction of the insurance commissioner. Only policies which either on an unspecified basis as to coverage or for an indivisible premium provide coverage against the peril of fire and substantial coverage against other perils are eligible for inclusion in § 38-99 (b). In order to be relieved from compliance with § 38-98 these policies (1) must afford coverage with respect to the peril of fire not less than the substantial equivalent of the coverage afforded by the standard fire policy; (2) must incorporate the provisions in relation to mortgagee interests and obligations as set forth in the standard policy without change; (3) must be complete as to all terms without reference to any other document; and (4) the commissioner must be satisfied that the policy complies with these requirements.[10] See General Statutes § 38-99 (b).

reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same, and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made."

[10] We do not perceive the commissioner's function as merely ministerial. We doubt that the commissioner would abuse his discretion by refusing to approve a policy pursuant to General Statutes § 38-99 (b) that failed to provide the substantial equivalent of the standard policy. By way of example only, if a policy were to contain a provision that the insurer would not have to pay a loss for six months rather than the sixty days provided by the standard form, the commissioner would not be obliged to approve it.

000029

The defendant claims that because the insurance commissioner can approve insurance policies not in compliance with the standard form, the oath prescribed by that form is not required by law for § 53-368 purposes. We are unpersuaded. Assuming without deciding that the insurance policy herein involved met the first three requirements enumerated in § 38-99 (b), the record before us provides no indication that the policy satisfies the fourth criteria, viz., there is no showing that the insurance commissioner is satisfied that the policy complies with § 38-99 (b). This would preclude the operation of § 38-99 (b) in the present case.

It follows, therefore, that the instant policy falls within § 38-99 (a) which provides that "[n]o policy or contract of fire insurance shall be made, issued or delivered by an insurer or any agent or representative thereof, on any property in this state, unless it conforms as to all provisions, stipulations, agreements and conditions with the form of policy set forth in section 38-98. . . ." The defendant gains nothing on this claim.

The defendant next claims that § 38-98 establishes only a model contract provision and is not to be treated as a legislative enactment once the policy has been accepted by the parties. He asserts that on this basis the oath set out in § 38-98 cannot be by law required for the purposes of a prosecution pursuant to § 53-368. In support of this contention the defendant cites a series of older cases. Principally the defendant relies on the decisions in *Shawnee Mut. Fire Ins. Co.* v. *School District*, 44 Okl. 3, 143 P. 194 (1914), *Reed* v. *Washington Fire & Marine Ins. Co.*, 138 Mass. 572 (1885), and *Dunton* v. *Westchester Fire Ins. Co.*, 104 Me. 372, 71 A. 1037 (1908). These cases establish the general proposition that " '[a] policy of fire insurance in the standard form prescribed by . . . [the

legislature] . . . is not to be treated as a legislative enactment after it has been accepted by the parties, but as a voluntary contract, which, like any other contract, derives its force and efficacy from the consent of the parties . . . .' " *Shaunee Mut. Fire Ins. Co.* v. *School District*, supra, 8; see *Reed* v. *Washington Fire & Marine Ins. Co.*, supra, 577; *Dunton* v. *Westchester Fire Ins. Co.*, supra, 378.

We find these cases to be inapposite. As a preliminary observation we note that all of the above-referenced cases as well as our own decisions indicate that the provisions of the standard policy are required or prescribed by law. In *Shaunee Mut. Fire Ins. Co.* v. *School District*, supra, the court (p. 8) noted that "[t]he terms and provisions of the standard policy of fire insurance, the use of which is *required by legislative enactment*, are to be considered as employed in the sense in which they were used and interpreted by the courts before that form of policy was adopted." (Emphasis added.) The court in *Reed* v. *Washington Fire & Marine Ins. Co.*, supra, 577, noted that "it is not to be presumed that the Legislature intended, *by prescribing the form of contract*, and prohibiting any other, to give it effect in depriving a party of rights which, as a contract, it would not have." (Emphasis added.) In *Dunton* v. *Westchester Fire Ins. Co.*, supra, 378, the court indicated that the Maine standard policy was "prescribed by statute." Finally this court, in *Covenant Ins. Co.* v. *Banks*, 177 Conn. 273, 277-78, 413 A.2d 862 (1979), stated that the appraisal clause set forth in General Statutes § 38-98 was both "required" and "mandated" to appear in a contract of fire insurance. See also General Statutes § 38-99 (a).

The cases cited by the defendant focus not on whether the standard policy is required by law, indeed they assume that fact, but rather on how the particular

000031

policy is to be interpreted, viz., either in terms of statutory construction or contract law. Faced with that issue the cases have determined only that the standard policy is to be interpreted as a contract and not a statute. The decisions determine nothing more. On the contrary, they are strong authority for the proposition that the terms of § 38-98 are required by law.

The defendant's final assertion is that because the insurance company could waive the proof of loss, the oath thereon is not one required by law. Based on our decision in *State* v. *Tedesco*, supra, 285–87, we reject this claim. In *Tedesco* the defendant was charged pursuant to § 53-368 with falsely certifying the administration of an oath on an application for the renewal of a liquor permit. The defendant in *Tedesco* claimed that if the liquor permit renewal application was insufficient or defective for any reason, the liquor commission would lack jurisdiction to act on the renewal in which case the oath in question would not be required by law. The court found this position to be untenable. The court noted that where the permit was valid as to the commission, the club and the permit holder because the parties had agreed to the procedure, the defendant (who had notarized the permit application) had no standing to object because when making the certification he knew the application would be filed with the commission for action thereon.

Likewise, we conclude that the defendant in the present case is without standing to object. He cannot raise the insurance company's right to waive the proof of loss as a defense. The insurer and the insured were acting pursuant to an agreed upon contractual procedure. The defendant was not a party to this contract. The proof of loss was submitted to the insurance company in accordance with the policy. The proofs of loss were certified with knowledge that they would be forwarded

000032

to the insurer and, indeed, the defendant himself sent the forms to the insurer. *State* v. *Tedesco*, supra, 287.

Our limited holding, therefore, is that the oath prescribed by General Statutes § 38-98 is one required by law for the purposes of a prosecution pursuant to General Statutes § 53-368.

III

Because they are likely to arise at retrial, we consider the defendant's remaining claims of error. The defendant next urges that his right to counsel guaranteed by the sixth amendment to the United States constitution and article first, § 8 of the constitution of Connecticut was violated when his conversations were secretly recorded after he had been arrested and retained counsel for other charges arising out of the same grand jury investigation.

In February, 1977, the grand juror filed with the court his report of the investigation of fires, thefts and vandalisms which had occurred in eighteen New Haven buildings. Relying on this report, the state applied for a warrant charging the defendant with criminal mischief and aiding a larceny in connection with the burning of a building at 80 Winchester Avenue in the city of New Haven. The warrant was issued on March 23, 1977, and the defendant was arrested on March 29, 1977. Counsel entered an appearance for the defendant on March 29, 1977.

In April, 1977, after Biller's arrest on the criminal mischief and larceny charges, he was engaged by Peter Cappola in a conversation while Cappola was wearing a "body mike." Cappola was acting in concert with the police. This conversation was recorded and transcribed by the police. Thereafter, the state, in November, 1977, relying on the grand juror's report, sought and obtained

a warrant for the defendant's arrest on the charges that he falsely certified the administration of oaths. The warrant was issued on November 16, 1977, and the defendant was immediately arrested. Defense counsel appeared in that case on November 21, 1977. During the defendant's trial on the false oath charges, portions of the transcripts and the tapes of the Biller-Cappola conversations relating to the Norton Street fires were admitted into evidence over the defendant's objection.

The defendant claims that incriminating statements were elicited from him after the start of adversary criminal proceedings and after he had retained counsel. He asserts that since the grand jury report provided all of the basis necessary to establish probable cause for the criminal mischief, aiding larceny and false oath charges, the state violated his right to counsel by eliciting statements from him through an informant after he had been arrested and had obtained counsel on the criminal mischief and aiding larceny charges. The defendant maintains that, in view of the factual background of the grand jury investigation, the false oath charges were not separate and distinct matters.

We find these claims unpersuasive.[11] "The right to counsel attaches 'at or after the initiation of adversary

[11] To the extent that the defendant is suggesting that he had a right to be arrested for all charges arising from the grand jury investigation at the same time, he is in error. "There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the fourth amendment if they act too soon, and a violation of the sixth amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction." *Hoffa* v. *United States*, 385 U.S. 293, 310, 87 S. Ct. 408, 17 L. Ed. 2d 374, reh. denied, 386 U.S. 940, 951, 87 S. Ct. 970, 17 L. Ed. 2d 880 (1966); *United States* v. *Marion*, 404 U.S. 307, 325n, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971). Nor are the police required to reveal all their cards in an application for an arrest warrant.

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judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' *Kirby* v. *Illinois*, 406 U.S. 682, 688-89, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972)." *State* v. *Ledbetter*, 185 Conn. 607, 609, 441 A.2d 595 (1981).

Unlike *Massiah* v. *United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), the present case does not involve the use of incriminating statements made by an indicted defendant out of the presence of counsel to prove the charges pending against the defendant. Rather, the evidence of the conversations taped after Biller's arrest was used as proof in the later charged false oath prosecution. *Massiah* and its progeny establish that constitutional rights are violated where the government covertly gathers admissions of some past wrongdoing of which a suspect already stands accused, while different or subsequent criminal acts may be secretly investigated even though the target is under suspicion of another earlier crime. *United States* v. *Calhoun*, 669 F.2d 923, 925 (4th Cir.), cert. denied, 456 U.S. 946, 102 S. Ct. 2014, 72 L. Ed. 2d 469 (1982); see *United States* v. *Capo*, 693 F.2d 1330, 1339 (11th Cir. 1982); *United States* v. *Missler*, 414 F.2d 1293, 1303 (4th Cir. 1969), cert. denied, 397 U.S. 913, 90 S. Ct. 912, 25 L. Ed. 2d 93 (1970); *United States* v. *Diamond*, 492 F. Sup. 583, 586 (D. Md. 1980), aff'd, 660 F.2d 996 (4th Cir. 1981).

Massiah offers no basis for the exclusion of testimony relating to uncounseled, post-indictment statements that involved criminal acts or constituted criminal acts in themselves. Such statements, even though elicited by government agents after indictment and in the absence of counsel, may form the basis for a separate or superseding indictment and may be offered to prove such additional charges. *United States* v. *Osser*, 483

F.2d 727, 730-34 (3d Cir.), cert. denied, 414 U.S. 1028, 94 S. Ct. 457, 38 L. Ed. 2d 321 (1973); *United States* v. *Missler*, supra, 1302-1303. A defendant indicted for one offense is not immunized from accountability for statements uttered subsequently tending to prove another crime. *United States* v. *Calhoun*, supra, 925.

Nor are we persuaded by the defendant's claim that the false oath charges were not separate and distinct from the earlier criminal mischief and aiding larceny charges because they all arose out of the same grand jury investigation and report. The false oath charges encompassed the defendant's alleged false certification of an oath on proof of loss forms signed by Peter and Marilyn Cappola relating to two fires which had occurred at 66-68 Norton Street in a building owned by the Bridgehaven Corporation, an entity controlled by the Cappolas. The premises were insured by the Affiliated F.M. Insurance Company of Rhode Island. The criminal mischief and aiding larceny charges, however, encompassed property damage and claims submitted therefor relating to property located at 80 Winchester Avenue, in a building owned by D & J Investments Incorporated of which Dante Nardini was president. The premises were insured by the Covenant Insurance Company. We cannot find that these different crimes involving different owners, different insurance companies, and different participants were not separate and distinct solely because the prosecution arose out of the same grand jury investigation. The evidence elicited from the defendant and subsequently admitted at trial did not violate the defendant's sixth amendment right to counsel.[12]

[12] In past decisions we have not specifically accorded the right to counsel guaranteed by article first, § 8 of the constitution of Connecticut a broader application than that guaranteed by the sixth amendment to the federal constitution. See *State* v. *Boulay*, 189 Conn. 106, 112-13, 454 A.2d 724 (1983); *State* v. *Derrico*, 181 Conn. 151, 167-69, 434 A.2d 356, cert. denied, 449 U.S. 1064, 101 S. Ct. 789, 66 L. Ed. 2d 607 (1980). Nor, given the circumstances of this case, are we inclined to consider whether the Connecticut constitution is to be so construed.

000036

IV

The defendant claims that the court erred when it excluded expert testimony proffered by the defense on the subject of the 1975 replacement cost of the Norton Street premises. The defendant's witness, Sabino Panca, indicated that he had viewed the structure in 1979. The court ruled that the defense had not laid a proper foundation for the admission of the expert testimony on the subject of the 1975 replacement cost of the building in that the defense had not demonstrated that the building was in the same condition when Panca viewed it as it was in 1975.

The trial court has wide discretion in ruling on the admissibility of expert testimony and this discretion is not to be disturbed unless that discretion has been abused, or the error is clear and involves a misconception of the law. *Going* v. *Pagani*, 172 Conn. 29, 35, 372 A.2d 516 (1976). An expert's knowledge must be directly applicable to the matter specifically in issue. *Going* v. *Pagani*, supra, 35; *Siladi* v. *McNamara*, 164 Conn. 510, 513-14, 325 A.2d 277 (1973). It is essential that the expert's personal knowledge or observation shall have been reasonably contemporaneous with the thing or occurrence in controversy; knowledge gained or observations made long subsequent thereto, after a material change of conditions is insufficient. 2 Jones, Evidence (6th Ed.) § 14:20, p. 638; *State* v. *Auclair*, 33 Conn. Sup. 704, 713-14, 368 A.2d 235 (1976).

Herein, there had been testimony earlier in the trial that the owner had expended just over $100,000 in the fall of 1976 "to completely remodel the building top to bottom." Even accepting, arguendo, the defendant's claim on appeal that because the insurance contract was a replacement policy only structural modifications were pertinent, we cannot conclude that the court abused

000037

its discretion, in light of the testimony, by requiring the defense to establish that the building was in substantially the same condition when Panca viewed it in 1979 as it was in 1975. The uncertainties in the essential facts were such as to make an opinion based on them without substantial value. *Sears* v. *Curtis*, 147 Conn. 311, 314-15, 160 A.2d 742 (1960); *Floyd* v. *Fruit Industries, Inc.*, 144 Conn. 659, 666, 136 A.2d 918 (1957).[13]

The defendant's further claim that he was barred from establishing a foundation for the admission of Panca's testimony is simply without merit. The witness, Panca, was asked whether there had been additions or deletions to the structure over the preceding ten years which could affect the replacement cost. Insomuch as the defense had failed to establish that the witness had been in the building before 1979, he was not competent to answer. The defendant was not, however, barred from producing this evidence through other witnesses; and, indeed, the court even suggested what was needed to establish a foundation.

Additionally, the defendant claims that error occurred during the cross-examination of an independent insurance adjuster, Gerald Hale, who testified on behalf of the state. As an expert witness, Hale gave two opinions apparently relevant to whether the defendant had the necessary intent to deceive. See *State* v. *Tedesco*, supra, 291. He testified (1) that the estimates of fire damage on the proofs of loss submit-

[13] We do not consider today's opinion to be in conflict with our decision in *F. P. Carabillo Construction Co.* v. *Covenant Ins. Co.*, 172 Conn. 564, 567-68, 375 A.2d 1029 (1977). That case involved a suit on a fire insurance policy. At issue was what damage was caused by fire and what damage was caused by vandalism and deterioration. On that issue the lapse of time between the fire and the inspection by the defendant's witness did not preclude the admissibility of his opinion. On the facts the court held that the time lapse, if anything, favored the plaintiff.

000538

ted by the defendant were excessive and (2) that his own much lower estimates were correct. On cross-examination he testified that it was "kind of usual" for public adjusters representing fire loss claimants to give estimates exceeding the estimates of fire losses which he would make on behalf of insurance carriers. A further question about the usual industry practice which is followed when such a disparity appears between the claimant and the insurer over the extent of the fire loss was excluded. The court also sustained the state's objection to additional inquiries about prior negotiations between the witness and the defendant over fire loss claims on other properties. The defendant excepted to these rulings upon the ground that the common practice of public adjusters to maximize fire loss estimates was not essentially different from that of lawyers who initially present claims of damages far in excess of the amounts they ultimately accept in settling those claims for their clients.

The defendant claims that the industry custom as followed in prior dealings between him and Hale under similar circumstances was relevant upon the issue of fraudulent intent. Because the state relied upon the fact that the damage estimates of the defendant were substantially higher than those of the witness, evidence of a common practice for public adjusters to overstate and for insurance company adjusters to understate such losses had some bearing on the question of intent. Because we have ordered a new trial we do not consider whether this ruling alone would constitute reversible error.

The defendant's remaining claims of error focus on an evidentiary ruling made by the court as well as the refusal of the court to charge as requested by the defendant. It is sufficient to note that we have exam-

000039

ined these claims carefully and conclude that they are without merit. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Cole*, 189 Conn. 518, 538, 457 A.2d 656 (1983).

General Statutes § 53-368 proscribes the false certification of an oath. The intent to deceive required by this statute relates to whether the oath or affirmation was sworn or affirmed before the defendant by the person making the affidavit, deposition or written statement. The evidence adduced at trial concerning the contents of the proofs of loss other than those portions relating to the oath and certification by the defendant, while relevant to show that the defendant's deception with respect to the oath was part of a greater deception to defraud the Cappolas' insurer, was not essential to establish violation of the statute. See *State* v. *Tedesco*, supra, 288–89.

There is error, the judgment is set aside and a new trial is ordered.

In this opinion SPEZIALE, C. J., PETERS and GRILLO, Js. concurred.

SHEA, J. (concurring and dissenting). I agree fully with Parts I, III and IV of the court's opinion. My disagreement is only with Part II of the opinion, which concludes that the oath upon the proof of loss form was "required by law" within the meaning of General Statutes § 53-368. I fail to comprehend how an oath on a proof of loss under a fire policy can be said to be "required by law" when General Statutes § 38-99 (b) provides that policies without a provision for an oath on a proof of loss are permissible if they contain the three essentials specified: (1) fire coverage equivalent to the standard fire policy; (2) the standard form provisions in relation to mortgagee interests and obligations; and (3) completeness as to all terms without

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reference to other documents. The fourth condition, that the commissioner be satisfied that the policy "complies with the provisions hereof," confines the discretion of the commissioner to ascertaining whether the prior three conditions have been met by the proposed policy. The commissioner would not be authorized to insist upon a provision for oaths upon proofs of loss, because such a provision could not reasonably be deemed necessary to implement fulfillment of the three essential requirements specified by § 38-99 (b), none of which pertains to proofs of loss.

Since it is optional for an insurance company to include a provision for an oath on a proof of loss in a policy after obtaining commissioner approval, which cannot be withheld merely because of the absence of an oath, such an oath is not "required by law." It cannot be contended that oaths which are called for only by the terms of an agreement are "required by law." The legislature obviously did not intend to include all oaths within the ambit of § 53-368, but imposed the "required by law" limitation so that it would apply only in those situations deemed sufficiently important to have induced the legislators to specify an oath as essential. Presumably those would involve circumstances where some strong public policy would be implemented by the requirement of an oath and would not include those where the requirement of an oath was thought desirable merely by the parties involved. By giving the insurer the right to omit the oath on a proof of loss and to sell fire policies with or without it, § 38-99 (b) has left the decision of whether to include such a provision in a policy entirely to the parties. Since the provision is no longer an essential ingredient of a fire policy, I do not see how it can be said to be "required by law," and would remand the case with direction to render judgment dismissing the information with prejudice.

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No. 22265

STATE OF CONNECTICUT : SUPERIOR COURT

v. : J.D. OF NEW HAVEN

MEYER BILLER AUGUST 15, 1984

MEMORANDUM OF DECISION ON MOTION TO DISMISS

The defendant faces a criminal prosecution under an information in two counts charging him with violations of Connecticut General Statutes 53-368, falsely certifying as to the administration of an oath. One of the elements of said crime, and the one that this motion directs itself to, is that the State must prove, as a part of a successful prosecution under this statute, that the oath is by law required.

The court heard testimony and received evidence which establishes that a policy of insurance was issued to Peter M. and

Marilyn Coppola. It can be accurately described as a special Multi-Peril "Apartment House Policy." This policy was issued for an effective period of February 1, 1974 to February 1, 1979. It provided property loss coverages with an aggregate limit of liability of $580,000. By endorsement, the repair/replacement limit was raised to $500,000 until February 1, 1977. The total premium was in the amount of $1594 and the only specification or breakdown of said premium was stated to be:

Real Property and Debris Removal	$1450
Rental Income	144
	$1594

This policy insured against all risks of direct physical loss to the property, subject to policy terms and conditions. It covered losses of real property, personal

property, machinery, apparatus, materials and supplies used with said real property; contractors' interests that the insured by prior contract had agreed to keep insured; debris removal; extra expense; valuable papers and records and incidental property removed from the premises for repair, service or exhibition. The all risk coverage afforded greatly exceeds the limited Fire, Lightning and Removal risks coverage mandated by §38-98.

This policy by its terms would pay for the actual cost of the replacement for any loss, up to the policy limits as specified. This coverage also exceeded the mininimum coverage mandated by §38-98.

Losses were suffered by the insureds and claims on their behalf were filed with the insurer. Proofs of loss were filed to

accomplish this. The central issue herein is whether or not these proofs of loss were required by law to be sworn to.

Connecticut General Statutes §38-98, as it existed at the appropriate times in 1975, spells out the mandatory form that a standard fire insurance policy should follow. This standard form policy mandates or contains coverage for direct loss suffered by fire, lightning and removal from premises endangered by such perils insured against. Section 38-102 further permits, as approved by the Commissioner, said standard form of fire insurance to be endorsed or extended coverages may be added thereto, adding perils insured against over and above those covered by the standard (statutory) fire insurance policy.

Section 38-99(a) provides that no

policy shall be made, issue or delivered unless it conforms to all the provisions set forth in §38-98, one of which statutorily mandated provisions being "... The insured shall render to this company a proof of loss, signed and sworn to by the insured..."(Emphasis added).

Section 38-99(B) provides that "any policy or contract which includes either on an unspecified basis as to coverage or for an indivisible premium, coverage against peril of fire and substantial coverage against other perils need not comply with the provisions of subsection (a) hereof, provided (1) such policy or contract shall afford coverage, with respect to the peril of fire, not less than the substantial equivalent of coverage afforded by said standard fire insurance policy, (2) the

provisions in relation to mortgagee interest and obligations in said standard fire insurance policy shall be incorporated therein without change, (3) such policy or contract is complete as to all of its terms without reference to any other document and (4) the Commissioner is satisfied that such policy or contract complies with the provisions hereof.

With respect to the policy in question, except for the endorsement of coverage insuring against loss of rental income, all remaining coverages are provided for upon the agreement to pay a premium that is indivisible as to the various risks insured against, and the various items of property insured thereunder. Further, said policy provides for substantial coverage against other perils. The coverages well exceed

the minimum required under §38-98.

The evidence establishes that the policy in question provides the substantial equivalent of the coverage afforded by the said standard insurance policy. The standard fire insurance policy provision in relation to mortgagee interests and obligations are incorporated without change. The policy is complete as to all of its terms without reference to any other document.

Under subpoena an authorized delegate of the Insurance Commissioner testified that the type of policy in question herein had been approved by the Commissioner on June 27, 1973. The court finds from the evidence that specific types of approvals under specific statutory provisions are not issued by the commissioner. He approves

under applicable statutes and regulations.

Thus when the witness says there was not a §38-99(B) approval given for this policy it is true, because the procedures of the Commissioner neither require applying for nor granting of such specific approvals. The Commissioner reviews and accepts or disapproves all policy form, endorsements,...used by property and casualty insurance companies. Regulations of Connecticut State Agencies §38-4-5(c)(1). These actions are taken under all applicable Regulations and Statutes.

The State contends that this situation represents a standard §38-98 fire policy with endorsements as permitted by §38-102. As such, a proof of loss would be required by law to be filed under oath as provided

by §38-98.

The defendant, in part, contends that this policy was issued and is utilized under the provisions of §38-99(B) and under said statute, it is not required by law that a proof of loss be under oath.

Statutes with respect to criminal prosecutions must be "strictly construed to protect the fundamental constitutional right to liberty." State v. Cook, 183 Conn. 520, 522 (1981); State v. Moore, 158 Conn. 461, 465 (1969); State v. Penner, 85 Conn. 481, 484 (1912). The court holds herein that the policy in question, under which the proofs of loss were filed were utilized and approved under the provisions of §38-99(B). The court further finds that the four conditions under said statute were met by the policy used herein and the

commissioner's action thereon. Therefore, a proof of loss filed thereunder is not required by law to be sworn to or under oath. Although it may be easily perceived that a mischief intended to be prevented may have occurred herein, such factor may not be regarded by this court in its construction of the applicable statutes. State v. Smith, 194 Conn. 213, 221 (1984). The court must look at the laws as drafted, not at its purported aim. Id.

The defendant advances certain other claims of constitutional dimension, claiming the statute to be void for vagueness, that this court abstains from considering in view of the disposition of the motion on statutory grounds.

Accordingly, the motion of the

defendant to dismiss is granted.

Higgins, J.

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No. CR6-193278

STATE OF CONNECTICUT : SUPERIOR COURT

V. : J.D. OF NEW HAVEN
at New Haven, G.A. 6

MEYER BILLER : NOVEMBER 12, 1982

MOTION IN LIMINE:
RE IMPEACHMENT BY PRIOR CONVICTIONS

The defendant respectfully requests that this Court order that the prosecuting authority be prohibited from admitting into evidence for the purposes of impeaching the credibility of Mr. Biller the fact that he had been previously convicted of a felony. The defendant requests that this Court rule on this motion prior to the initiation of trial.

In support of this motion, the defendant states:

1. Mr. Biller was convicted in the summer of 1979 of two counts of falsely

certifying an oath in violation of Section 53-368.

2. Mr. Biller desires to testify in his own defense in the instant matter.

3. If this Court should rule that the State would be allowed to impeach Mr. Biller with those previous convictions, he would be deterred from testifying in his own defense, thus depriving him of the most effective witness available to present a defense in the instant charges. Mr. Biller is entitled to know, prior to deciding whether to testify in his own defense, whether this Court will allow the State to impeach him with these prior convictions.

4. While Section 52-145 permits the Court to allow impeachment of a witness on a cross-examination by a conviction of a crime if the maximum permissible penalty

for the crime may be imprisonment for more than one year, this Court has the inherent authority to exclude evidence where its prejudicial tendency out-weights its probative value. State v. Nardini, 187 Conn. 513 (1982); State v. Marquez, 160 Conn. 47, 52 (1970).

5. The defendant submits that if the State were allowed to impeach him with prior convictions, the prejudicial effect of that evidence would far outweight its materiality and relevancy on the issue of credibility.

6. Because the prior conviction involved documents relating to a questioned fire loss, there can be no doubt that admission of those convictions is overwhelmingly prejudicial as this case also concerns allegations of impropriety

with respect to claims for fire loss.

7. Although the convictions occurred in the summer of 1979, the incidences which gave rise to those convictions occurred in April and June of 1974, more than eight years prior to the date of the instant trial and seven years prior to the date of the offense alleged in the instant case.

8. While the defendant recognizes the claim that this conviction may have a bearing on the defendant's credibility, the similarity between the facts surrounding the earlier case and the instant case is so marked that the balance must be struck in favor of precluding the State from using said convictions to impeach the defendant's credibility.

9. And for such further reasons as may become apparent upon the hearing of this

motion.

WHEREFORE, the defendant respectfully requests that this Court rule, prior to trial, that the State may not use these prior convictions to impeach Mr. Biller when he elects to testify in his own defense.

THE DEFENDANT

BY _____
William F. Dow, III
JACOBS, GRUDBERG & BELT, P.C.
His Attorneys

O R D E R

The foregoing motion having come on before me and it appearing that the same should be granted, it is hereby ORDERED:

DENIED

BY THE COURT

J. Sullivan /s/
Clerk

No. CR6-193278

STATE OF CONNECTICUT : SUPERIOR COURT

V. : J.D. OF NEW HAVEN
at New Haven, G.A. 6

MEYER BILLER : NOVEMBER 12, 1982

MOTION TO SUPPRESS EVIDENCE

The defendant moves to suppress as evidence in any and all proceedings against him all evidence seized and obtained in the instant matter and any and all evidence, tangible and intangible, directly obtained or indirectly derived from said evidence. The defendant relies on his rights under the Fourth and Fourteenth Amendments to the United States Constitution, Article I, Section 7 of the Constitution of the State of Connecticut, and the relevant portions of the Connecticut General Statutes, in one or more of the following respects:

1. The property was seized without a

warrant;

2. The warrant is insufficient on its face;

3. The property seized is not adequately described in the warrant;

4. There was not probable cause for believing the existence of the grounds upon which the warrant was issued;

5. The warrant was issued without a sufficient independent judicial determination of probable cause;

6. The warrant was illegally executed;

7. The warrant was not executed and returned with reasonable promptness;

8. The warrant which led to the search was illegal;

9. The allegations contained in the affidavit, which was the basis for the search warrant, are not true; and

10. For such further grounds as may

become apparent upon the hearing of this motion.

THE DEFENDANT

BY _____
William F. Dow, III
JACOBS, GRUDBERG & BELT, P.C.
His Attorney

O R D E R

The foregoing motion having come on for a hearing before me and it appearing that the same should be granted, it is hereby ORDERED:

DENIED 11/5/82

BY THE COURT

_____
Clerk

APPELLATE COURT NO. 2073

STATE OF CONNECTICUT : SUPREME COURT

v. : STATE OF CONNECTICUT

MEYER BILLER : FEBRUARY 17, 1986

[Excerpt from]
PETITION FOR CERTIFICATION

To the honorable chief justice and associate judges of the supreme court.

The undersigned respectfully represents:

1. He is a party defendant in the above entitled action.

2. He is aggrieved by the decision of the court in State v. Biller, 5 Conn. App. 616 (1985), upon questions of law arising in the trial of the action, and desires to appeal from the final judgment to the supreme court.

I. STATEMENT OF THE MATTER INVOLVED

A. STATEMENT OF PROCEEDINGS

The defendant was arrested for acting as a public adjuster without a license, General Statutes §38-71, and by substituted information was also charged with interference with a police officer, General Statutes §53a-167a. After the trial, the jury retired, announced a deadlock, received the so-called "Chip Smith" charge, deliberated some more, and returned deadlocked on the charge of acting as a public adjuster without a license, but convicted the defendant of interfering with a police officer. The trial court (Sullivan, J.) then sentenced the

. . .

was prevented from testifying on his own behalf. (R. 28-31, Tr.50, 604). The trial court also took the conviction on appeal

into account in sentencing the defendant to the maximum of one year and imposing a $500.00 fine. (Tr. 733-34.) It has now been determined that the prior conviction was invalid as a matter of constitutional law. The conviction was reversed because it was based on involuntary testimony, in violation of the privilege against self-incrimination. State v. Biller, 190 Conn. 594, 605 (1983). On remand the trial court (Higgins, J.) found that the defendant could not have committed the crime as a matter of law, even under the prosecution's theory of the disputed facts, and dismissed the action. A copy of Judge Higgins' memorandum on the motion to dismiss is also attached. The state did not appeal the dismissal. Therefore, it has now been conclusively determined that the trial court in this case acted on what

turned out to be misinformation of constitutional magnitude. The prior invalid conviction, which did not even constitute a crime as a matter of law and which was based on coercion, prevented the defendant from testifying and was used to enhance his punishment.

II. QUESTIONS PRESENTED

1. Should the defendant's conviction be reversed because it was based on a prior conviction then on appeal which was constitutionally invalid because it was based on coerced testimony and because the defendant's acts did not constitute a crime as a matter of law?

2. Should the defendant's sentence be vacated because it was based on a prior conviction then on appeal which was constitutionally invalid because it was

based on coerced testimony and because the defendant's acts did not constitute a crime as a matter of law?

3. Did the trial court err in refusing to find that the defendant's arrest was without probable cause and the search incident to that arrest illegal?

. . .

defendant's person during this illegal arrest must also be suppressed." Brief for Defendant at 12. Furthermore, in responding to the State's argument that Licari should be overruled, the defendant in his reply brief stressed the fact that evidence was seized pursuant to an illegal arrest which would require suppression and reversal in any event. Reply Brief for Defendant at 3.

The court below did not decide the

question of probable cause because, under its analysis of State v. Privitera, 1 Conn. App. 709 (1984), it was irrelevant. State v. Biller, 5 Conn. App. at 620. Therefore, the opinion below would allow, in effect, evidence seized during an illegal arrest to be used to support an interfering charge, which is what happened here. As such, the court below is wrong. The fruits of a search incident to an illegal arrest must be suppressed under the Fourth and Fourteenth Amendments and under Article 1, §7 of the Connecticut Constitution. E.g., State v. Kimbro, 197 Conn. 219, 223 (1985); State v. Guertin, 190 Conn. 440, 453-4 (1983).

. . .

[Excerpt from Brief of Defendant on Appeal to the Appellate Court of the State of

Connecticut]

TABLE OF CONTENTS
(continued)

Page

VII. THE CONVICTION MUST BE REVERSED BECAUSE THE DEFENDANT WAS PREVENTED FROM TESTIFYING ON HIS OWN BEHALF WHEN THE TRIAL COURT RULED THAT A PRIOR CONVICTION THEN ON APPEAL (AND LATER REVERSED) WAS ADMISSIBLE FOR IMPEACHMENT.....28-36

A. The Trial Court Abused Its Discretion When It Ruled the Defendant's Prior Conviction Then on Appeal and Later Reversed Was Admissible for Impeachment.....28-33

B. Alternatively, This Court Judicially Notice the Grounds on Which the Impeaching Conviction Was Reversed and, in the Interests of Justice, Reverse the Present Conviction.....33-35

C. Alternatively, the Sentence, Based as It Was on the Subsequently Reversed Conviction, Must Be Vacated

and a New Sentence Hearing Ordered.....35-36

VIII. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO STRIKE THE TESTIMONY OF WILKEN SHAW WHEN THE PROSECUTION COULD NOT PRODUCE AN ELECTRONICALLY RECORDED STATEMENT SHAW GAVE TO THE POLICE.....36-40

CONCLUSION.....40-41

COURT'S JURY INSTRUCTION ON §53a-167a.....42-44

. . .

and 38-69 had not (and still have not) been interpreted in reported decisions. Thus, the situation cried out for a pre-arrest judicial interpretation through the warrant process, rather than the post-arrest after-the-fact justification made inevitable by the warrantless arrest. But because the police risked an on-site arrest without prior judicial approval, a marginal case such as this must be decided against

them. Wong Sun v. United States, supra; Beck v. Ohio, supra; United States v. Ventresca, supra. Under all the circumstances, a reasonable prudent police officer would not have concluded that the defendant committed the crime of adjusting without a license on March 12, 1982. The trial court erred in concluding otherwise. An illegal arrest does not confer jurisdiction on Connecticut courts. State v. Licari, 153 Conn. 127, 132-34 (1965); State v. Iasevoli, 183 Conn. 325, 331-32 (1982); State v. Gallagher, 191 Conn. 433, 438-39 (1983); State v. Heinz, 38 Conn. Sup. 570, 574 (1982). The defendant has preserved this jurisdictional issue by a timely motion to dismiss. (R. 24.) Therefore, the motion to dismiss, which should have been granted below, must be

granted by this Court, and the information ordered dismissed. The evidence seized from the defendant's person during this illegal arrest must also be suppressed.

Supreme Court, U.S.
FILED
JUN 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1834

In The
Supreme Court Of The United States

OCTOBER TERM, 1985

MEYER BILLER,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF CONNECTICUT

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56p

QUESTIONS PRESENTED

1. SHOULD THIS COURT REVIEW CONSTITUTIONAL CLAIMS, NOT RAISED AT TRIAL, REGARDING THE PETITIONER'S PRIOR CONVICTIONS, WHERE THE STATE DID NOT OFFER THE CONVICTIONS AT TRIAL, THE SENTENCING COURT TOOK INTO ACCOUNT THAT THE CONVICTIONS WERE ON APPEAL, AND THE STATE APPELLATE COURT RESOLVED THE CLAIMS ON STATE PROCEDURAL DEFAULT GROUNDS?

2. SHOULD THIS COURT REVIEW AN EVIDENTIARY SUPPRESSION CLAIM, WHERE THE STATE APPELLATE COURT RESOLVED THE CLAIM ON STATE PROCEDURAL DEFAULT GROUNDS, THE CLAIM IS FACTUALLY COMPLEX AND OF LITTLE PRECEDENTIAL VALUE, AND THE SUCCESS OF THE PROSECUTION DID NOT DEPEND ON ADMISSION OF THE EVIDENCE?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES. i

RULES INVOLVED iii

STATEMENT OF THE CASE 1

REASONS FOR THE DENIAL OF THE PETITION 12

I. THE PETITIONER'S FIRST AND SECOND CLAIMS WERE RESOLVED ON ADEQUATE AND INDEPENDENT STATE GROUNDS AND ARE INSUBSTANTIAL ON THE MERITS. 12

A. These Claims Were Subject to a State Contemporaneous Objection Rule Which Constitutes An Adequate and Independent Ground Barring Review 12

B. The Claims Are Insubstantial on the Merits. 16

II. THE PETITIONER'S THIRD CLAIM WAS SUBJECT TO A STATE PROCEDURAL DEFAULT RULE WHICH CONSTITUTES AN ADEQUATE AND INDEPENDENT GROUND BARRING REVIEW, IS TOO FACT-LADEN FOR THIS COURT TO REVIEW, AND IS INSUBSTANTIAL ON THE MERITS. 19

A. The Claim Was Subject to a State Procedural Default Rule Which Constitutes an Adequate and Independent Ground Barring Review 19

B. The Issue of Whether Probable Cause Existed For the Public Adjustor Arrest Is too Fact-laden For This Court To Review. 22

C. This Claim Is Insubstantial on the Merits . . . 24

CONCLUSION 26

TABLE OF AUTHORITIES

Cases **Page**

Illinois v. Andreas, 463 U.S. 765 (1983) 25

Luce v. United States, 105 S. Ct. 460 (1984) 18

Michigan v. Long, 103 S. Ct. 3469 (1983). 14, 20, 22

Michigan v. Tyler, 436 U.S. 499 (1978) 14, 20, 22

New Haven Savings Bank v. Valley Investors, 174 Conn. 77. 382 A.2d 321 (1977) 20, 21

Rodriguez v. Mallory Battery Co., 188 Conn. 145, 448 A.2d 829 (1982) 20

State v. Biller, 5 Conn. App. 616, 501 A.2d 1218 (1985) 10

State v. Evans, 165 Conn. 61, 327 A.2d 576 (1973) 13

State v. Fleming, 198 Conn. 255, 502 A.2d 886 (1986) 5

State v. Harrell, 199 Conn. 255, __ A.2d __ (1986) 18

State v. Kish, 186 Conn. 757, 443 A.2d 1274 (1982) 16

Cases continued Page

State v. Licari, 153 Conn. 127, 214 A.2d 900 (1965) 5

State v. Ross 189 Conn. 42, 454 A.2d 266 (1983) 16

State v. Sinclair, 197 Conn. 574, 500 A.2d 539 (1985) 13

Stepney v. Lopes, 760 F.2d 40 (2d Cir. 1985) 15, 16, 22

Rules of Court

Rule 17,1, Revised Rules of the Supreme Court of the United States 23

Practice Book § 3063 13

RULES INVOLVED

Rule 17.1, Revised Rules of the Supreme Court of the United States

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons thereof. The following, while neither controlling nor fully measuring the Court's discretion indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial

proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this court.

Connecticut Practice Book § 3063

The supreme court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The supreme court may in the interest of justice notice plain error not brought to the attention of the trial court.

STATEMENT OF THE CASE

On the afternoon of March 12, 1981, Joseph Toscano, an experienced arson investigator assigned to the New Haven state's attorney's office, responded to the scene of a fire that gutted an abandoned building on Hallock Street in New Haven. Toscano noted that an adjoining house, owned by Wilken Shaw, had suffered exposure damage from the blaze.

Toscano also noticed that the petitioner was standing among the crowd of onlookers; the inspector knew the petitioner from prior arson investigations and was aware that the petitioner's public insurance adjustor's license had been revoked. Toscano watched the petitioner walk over to Wilken Shaw, who

was standing on the street, and begin to talk with him. When the petitioner took out a sheaf of documents, which he spread out on the hood of a parked car, and had Shaw sign them, Toscano and Joseph Howard, another arson inspector, walked over. See Respondent's Appendix at A1.

Toscano was familiar with the documents associated with a fire insurance claim; the inspector saw, in plain view, a document he believed was a public adjustor's employment contract form. Toscano overheard the petitioner assure Shaw's daughter-in-law that the parties had forty-eight hours to cancel the contract; this was the cancellation period for a public adjustor's contract. Id. at A2-A3.

Officer Howard spoke with Wilken Shaw, and asked him: "What did Mr. Biller represent himself as when he spoke to you initially?" Shaw explained that the petitioner had claimed to be a public adjustor, who would manage "all" the dealings between the insured and the insurance company. Id. at A3.

The two inspectors decided they had probable cause to arrest the petitioner for acting as a public adjustor without a license, in violation of Connecticut General Statutes § 38-71. Howard informed the petitioner he was under arrest. As Howard sought to handcuff him, the petitioner curled himself up into a ball, and grabbed at the officer's hand.

Howard also asked the petitioner to give him the papers that the officers had seen. The petitioner refused to surrender them, and a struggle for possession of the papers, which the petitioner had thrust into a trouser pocket, ensued. The petitioner again curled up, with his hands clasped over his pocket. With difficulty, the inspectors managed to lead the petitioner away from the fire scene to a police car. Only there were the officers able to seize the "wad" of documents. As a result of this incident, the petitioner was eventually also charged with interfering with an officer, Connecticut General Statutes § 53a-167a.

Prior to trial, the petitioner filed, inter alia, a motion to dismiss under the doctrine of State v. Licari,[1] 153 Conn. 127, 214 A.2d 900 (1965), and an omnibus motion to suppress evidence. See Petitioner's Appendix at 58-60. Prior to the evidentiary hearing on the motion to dismiss, the petitioner stated merely that the suppression motion "would be incorporated within the motion to dismiss." At the hearing, the petitioner made no argument regarding suppression of evidence. The trial court found ample evidence tending to

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[1] Licari, purportedly based on federal authorities, held that where an arrest lacked probable cause, the superior court had no personal jurisdiction over the defendant. See 153 Conn. at 132-34. The Connecticut Supreme Court overruled Licari in State v. Fleming, 198 Conn. 255, 258-263, 502 A.2d 886 (1986), after the trial in this case.

establish probable cause, and denied the motions.

The petitioner also filed a motion in limine to exclude evidence of his prior felony convictions for falsely certifying oaths, in violation of Connecticut General Statutes § 53-368. The petitioner knew that his convictions were on appeal, and he had already filed a preliminary statement of issues with the Connecticut Supreme Court, asserting that the convictions had been obtained with the use of compelled grand jury testimony.[2] See Petition at 27-28. The petitioner's motion, however, failed to apprise the trial court either of the pending appeal or of the self-incrimina-

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[2] The petitioner was represented by the same law firm in both the then-pending appeal and the instant trial. See Petitioner's Appendix at 4, 15.

tion claim. Petitioner's Appendix at 53-57. During trial, the court was told finally only the fact that the convictions were on appeal. Id. at 10.

The court denied the motion in limine. The petitioner did not testify on his own behalf. The State never offered the prior convictions into evidence.

At the conclusion of deliberations, the jury declared itself deadlocked on the public adjustor count, and a mistrial was declared as to that count. The jury returned a verdict of guilty to the interfering with an officer count.

At sentencing, the prosecutor reminded the trial court that the petitioner's prior convictions were on appeal. The court explicitly acknow-

ledged this in weighing the convictions as a factor at sentencing. The petitioner neither objected to consideration of the convictions nor alerted the court to a self-incrimination problem with them. Respondent's Appendix at A4-A7.

On appeal to the Connecticut Appellate Court, the petitioner presented eight claims of error. The petitioner's first issue was a thorough redaction of his dismissal claim. The petitioner's sole reference to any suppression claim, without citation to authority, came at the end of this argument: "The evidence seized from the petitioner's person during this illegal arrest must also be suppressed." Petitioner's Appendix at 70. The petitioner also argued that denial of his motion in limine to exclude prior

convictions, and consideration of those convictions at sentencing constituted the use of compelled testimony against him.

The State, in its brief, argued that the dismissal claim was meritless. The State also noted that the petitioner had failed to alert the trial court to any constitutional impediment to use of prior convictions, and that both denial of the motion in limine and the limited use made of the convictions at sentencing were not error under state law. Respondent's Appendix at A4-A7.

The petitioner's reply brief failed to either elaborate on, or cite authority for, a suppression claim. The only allusion to suppression was: "The documents taken from the petitioner's pockets (sic) were an integral part of

the State's interfering claim and, if illegally seized, must (sic) suppressed."

The Connecticut Appellate Court affirmed the petitioner's conviction; the court's holding did not mention the constitutional aspects of the petitioner's claim regarding his prior convictions or the suppression of evidence. See State v. Biller, 5 Conn. App. 616, 501 A.2d 1218 (1985).

The petitioner filed a motion to reargue with the Connecticut Appellate Court and then a petition for certification to the Connecticut Supreme Court; both were denied summarily by the state courts. See Petitioner's Appendix at 2, 13; Order denying petition for certification, 199 Conn. 803, ___ A.2d ___ (1986). In opposing the motion and the

petition, the State argued that the petitioner's failure to alert the trial court to a known constitutional defect in his convictions was induced error, a procedural default that rendered the claims unreviewable. Respondent's Appendix at A8-A14. Regarding the suppression issue, the State argued that mere mention of such a claim failed to present the issue to the state courts, and thus constituted another default. Id.

REASONS FOR DENIAL OF THE PETITION

I. THE PETITIONER'S FIRST AND SECOND CLAIMS WERE RESOLVED ON ADEQUATE AND INDEPENDENT STATE GROUNDS AND ARE INSUBSTANTIAL ON THE MERITS

A. These Claims Were Subject to a State Contemporaneous Objection Rule Which Constitutes An Adequate and Independent Ground Barring Review

In his first and second claims, the petitioner asserts that this Court should grant a writ of certiorari to review the denial of his motion in limine to exclude prior convictions, and the trial court's consideration of these convictions at sentencing. The petitioner reasons that since the convictions were later reversed on self-incrimination grounds, and as the charges were subsequently dismissed on retrial, that the instant conviction was

obtained, and his sentence enhanced, by the use of compelled testimony. The respondent submits that review of these claims is barred by Connecticut's procedural default doctrine.

Although Connecticut law permits appellate review of certain exceptional unpreserved claims; State v. Evans, 165 Conn. 61, 327 A.2d 576 (1973); Practice Book § 3063; review does not ordinarily extend to cases where a party has failed to raise in the trial court the precise objection he raises in the appellate court. Failure to state known grounds for an objection has been condemned as "trial by ambuscade," which deceives both the trial court and the opposing party. State v. Sinclair, 197 Conn. 574, 579, 500 A.2d 539 (1985), and cases cited therein. Application of such a

contemporaneous objection rule constitutes an adequate and independent state ground precluding review by this Court. Michigan v. Long, 103 S. Ct. 3469, 3474 n.4 (1983); Michigan v. Tyler, 436 U.S. 499, 512 n.7 (1978).

The petitioner was aware at the time of trial of a powerful constitutional objection to use of his prior convictions. See Petition at 21-22. The petitioner withheld this crucial information from the trial court. Indeed, the petitioner voiced no objection on any ground to consideration of his prior convictions at sentencing. It was not until the petitioner's appeal that he first mentioned the constitutional aspects of his claim. It may be inferred that the Connecticut Appellate Court applied its contemporaneous

objection rule to the petitioner's newly-raised constitutional claim, for the State raised the petitioner's procedural default in its brief and the court made no mention of the petitioner's constitutional claims, and confined its review solely to those facts regarding the prior convictions that had been communicated to the trial court. See Stepney v. Lopes, 760 F.2d 40, 43-44 (2d Cir. 1985) (State court's decision not to mention claim, coupled with State's argument of procedural default, justifies the conclusion that the court resolved the claim on a procedural default ground). The court's presumed refusal to entertain a claim known to the petitioner at trial, but held back until appeal, constitutes an adequate and independent ground for the

decision.[3] Michigan v. Long, supra; Michigan v. Tyler, supra.

B. The Claims Are Insubstantial on the Merits

As discussed, supra, the petitioner utterly failed to advise the trial court of a known constitutional objection to any use of his prior convictions, either during the argument on his motion in limine, or at senten-

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[3] This conclusion is strengthened by the similar circumstances surrounding the Connecticut Appellate Court's denial of the petitioner's motion to reargue. Induced error is another variety of procedural default in Connecticut. State v. Ross, 189 Conn. 42, 47, 454 A.2d 266 (1983); State v. Kish, 186 Conn. 757, 769, 443 A.2d 1274 (1982). In view of the fact that the Connecticut Appellate Court denied the petitioner's motion to reargue summarily, and the respondent argued induced error in its opposition papers, this Court can assume that the Connecticut Appellate Court denied the motion on the adequate and independent state ground of induced error. Stepney v. Lopes, supra.

cing. Wholly, aside from the fact that these procedural defaults, as argued, create an adequate, independent state ground for resolution of the issue by the Connecticut Appellate Court, they also reveal that the petitioner in the trial court did not find the constitutional argument he now raises to be all that compelling.

Indeed, the petitioner's claims directed to his prior convictions have only a certain superficial glamour, and no substance. The respondent never actually offered the petitioner's prior convictions into evidence at trial, let alone the compelled grand jury testimony that had contributed to them. And as the petitioner did not testify on his own behalf, the prejudice flowing from denial of his motion in limine remains

elusive. See State v. Harrell, 199 Conn. 255, 263-68, __ A.2d __ (1986) (adopting the rule of Luce v. United States, 105 S. Ct. 460 (1984), albeit prospectively). Nor can the trial court be said to have weighed the convictions particularly heavily at sentencing. Indeed, the court expressly took into account the fact that the convictions were an appeal in evaluating them. And the convictions formed only one of myriad factors gauged by the court in imposing sentence. The petitioner's claims are insubstantial on the merits, and thus form an inadequate basis for the granting of a writ of certiorari.[4]

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[4] The authorities relied upon by the petitioner are readily distinguishable. In those cases, the illegality of the prior convictions only became evident later, after they had been used against the defendants. By contrast, the petitioner here was already aware of the constitutional infirmities afflicting his prior

II. THE PETITIONER'S THIRD CLAIM WAS SUBJECT TO A STATE PROCEDURAL DEFAULT RULE WHICH CONSTITUTES AN ADEQUATE AND INDEPENDENT GROUND BARRING REVIEW, IS TOO FACT-LADEN FOR THIS COURT TO REVIEW, AND IS INSUBSTANTIAL ON THE MERITS

A. The Claim Was Subject To A State Procedural Default Rule Which Constitutes An Adequate And Independent Ground Barring Review

The petitioner's third proposed basis for the granting of certiorari rests upon the assertion that the Connecticut Appellate Court's holding permits the State to use evidence seized seized incident to an illegal arrest to

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convictions at the time of his trial. The petitioner had a full opportunity to explain to the trial court the significance of his self-incrimination claim, both at the hearing on his motion in limine, and later at sentencing. The petitioner cannot claim violation of his constitutional rights, merely because he choose not to avail himself of such an opportunity.

convict a defendant of another crime. In fact, this claim cannot survive a fair reading of the Appellate Court's decision; far from authorizing the use of illegally-obtained evidence, the holding is silent on the issue of evidentiary suppression. See Petitioner's Appendix at 3-12.

This Court will decline to review a state court decision that rests upon an adequate and independent state ground. Michigan v. Long, supra; Michigan v. Tyler, supra.

As a matter of Connecticut appellate procedural law, claims of error merely mentioned, but not properly briefed, are deemed abandoned and shall not be reviewed. Rodriguez v. Mallory Battery Co., 188 Conn. 145, 149, 448 A.2d 829 (1982); see also New Haven

Savings Bank v. Valley Investors, 174 Conn. 77, 84, 382 A.2d 321 (1977) (issue party introduced as "an afterthought in a terse statement in his brief" is inappropriate for review). This rule has the salutory purpose of alerting both the reviewing court and the opposing party to those claims the party actually intends to press on appeal.

The instant case demonstrates the wisdom of the Connecticut rule. The petitioner's suppression of evidence claim was no more than a bare statement, devoid of cited authority, appended in his Appellate Court brief to his lengthy dismissal claim. The Connecticut Appellate Court's failure to address the suppression claim strongly suggests that the court regarded it as neither distinctly raised on appeal nor properly

briefed. Such a decision not to entertain the petitioner's suppression claim rests on independent and adequate state grounds which bar review by this court.[5] Michigan v. Long, supra; Michigan v. Tyler, supra.

B. The Issue of Whether Probable Cause Existed For The Public Adjustor Arrest Is Too Fact-laden For This Court To Review

The petitioner identifies no provision of the Considerations Governing Review on Certiorari that would justify an allocation of this Court's scarce time to consideration of the

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[5] Although here, unlike the case with the petitioner's prior conviction claims, the respondent did not raise the petitioner's procedural default in it's appellate brief, it did not do so because it, like the Connecticut Appellate Court, regarded the issue as not distinctly raised. Cf. Stepney v. Lopes, supra.

correctness of a state trial court judge's finding of probable cause under a state penal statute. See Rule 17.1, Revised Rules of the Supreme Court of the United States. As the petition for certiorari itself reflects; Petition at 33-55; resolution of the question hinges on application of a highly specific state statute to an ideosyncratic and complex factual background, set forth in a full evidentiary hearing and drawing on numerous exhibits. The issue here is so fact-laden as to concern no-one save the immediate parties involved; resolution of the issue would have little or no precedential value for the legal system as a whole.

C. The Claim Is Insubstantial on the Merits

The petitioner's third claim is premised on the assumption that suppression of the actual documents seized would deprive the prosecution on the interfering with an officer count of an evidentiary basis. The respondent submits that this premise is erroneous.

The record below indicates that two arson inspectors saw, in plain view on a public street, papers, including a document one inspector believed to be a public adjustor's employment contract. The other inspector sought to seize a generic class of objects - "documents" - incident to arrest. Even if the actual papers were suppressible, the officers would in no way be estopped from testifying to what they observed in

plain view; Illinois v. Andreas, 463 U.S. 765 (1983); what they strove to do as a result of those observations, and what the petitioner did to interfere with their duties. The petitioner's claim that the prosecution depended on admissibility of the actual documents is meritless.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari to the Connecticut Supreme Court.

Respectfully submitted.

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APPENDIX

TABLE OF CONTENTS

Excerpts From Respondent's Brief
to The Connecticut Appellate Court . . A1

Excerpts From Respondent's
Opposition to Petitioner's Motion
to Reargue A8

Excerpts From Respondent's Brief
In Opposition to Petitioner's
Petition for Certification to
the Connecticut Supreme Court A11

EXCERPTS FROM RESPONDENT'S BRIEF TO THE CONNECTICUT APPELLATE COURT

I. THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO DISMISS []

A. Facts Pertaining to the Denial of the Defendant's Motion to Dismiss

. . . .

The defendant walked up to Wilken Shaw, owner of the damaged premises at 79 Hallock Street, spoke with Wilken Shaw and then produced several documents to sign. Willa Shaw, the owner's daughter-in-law, joined the pair and began to question the defendant about the documents. . .her father-in-law had signed. Toscano and Howard walked over to investigate. T. Nov. 9, 1982 at 60-62.

As the officers drew near, Howard overheard the defendant inform the Shaws to the effect "that he would take care of things with the insurance company . . . . " Toscano identified himself, displaying his badge. Howard's badge was pinned to his fireman's "turn out" coat. The defendant became agitated and turned away, saying: "I know who you are." Toscano asked the defendant about the status of his public adjustor's license. T. Nov. 9, 1982 at 25; T. at 51, 60, 62; T. at 33.

Willa Shaw asked the defendant about the legality of the documents and then insisted that he tear them up. The defendant replied that she had forty-eight hours to cancel the contract. Inspector Toscano briefly viewed the documents and believed that one was "a

retainment by a public adjustor." Eventually, Ms. Shaw prevailed on the defendant to tear up some of the contracts. T. Nov. 9, 1982 at 62, 63, 65; T. at 30.

As this was happening, Officer Howard spoke with Wilken Shaw, who told him that the defendant "had purported himself to be a public adjustor and that Mr. Biller would take care of all the dealings between Mr. Shaw and whatever insurance company was involved." Toscano recalled that Howard asked in summary: "What did Mr. Biller represent himself as when he spoke to you initially," and that Shaw responded "that he had represented himself as a public adjustor." T. Nov. 9, 1982 at 31; T. at 63, 72-73, 77.

The officers concluded that, on the basis of their information, the defendant had been "soliciting business from the owners of 79 Hallock Street . . . . . as a public adjustor." Toscano instructed Howard to place the defendant under arrest, for violation of General Statutes § 38-71. T. Nov. 9, 1982, at 33, 34; T. at 39-40.

. . . .

VI. THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION IN LIMINE RE IMPEACHMENT BY PRIOR CONVICTIONS

. . . .

The defendant ignores one signal fact which must not be forgotten in evaluating the merits of his claims, and the counter-claims advanced by the state in the arguments, infra. The record

indicates that the trial court was not informed that the convictions in question were on appeal until November 24, 1982, the date of imposition of sentence.[1] This was twelve days after the motion in limine, was ruled upon, on November 12, 1984. T. at 733-734; November 9, 1982 T. at 11-12.

. . . .

Lastly, prejudicial effect, viewed in light of information possessed by the trial court at the time of the ruling, must be gauged. The defendant is eloquent in his condemnation of the court for failing to consider the merits

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1 The State was mistaken in this contention; the trial court learned the bare fact that the convictions were on appeal in the midst of trial. However, there is no evidence that the court was ever informed of the constitutional claim known to the defendant at the time of trial, but raised for the first time on appeal.

of the constitutional claims advanced in his then pending appeal. Defendant's Brief at 29-35. In so doing, the defendant charges the trial court with prescience, not discretion. As noted supra, the record is bare of any suggestion that the trial court was informed that the prior convictions were on appeal, until the day of sentencing. See T. Nov. 9, 1982 at 11-12; T. at 52-53, 604. The defendant's Motion in Limine: Re Impeachment by Prior Convictions, dated November 12, 1982, claimed only that "similarity between the facts surrounding the earlier case is so marked" as to create undue prejudice.[8]

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[8] Even this claim of prejudice is without merit, as there is no indication that the State would have been permitted to divulge the factual basis of the convictions, had they been introduced. The trial court was scrupulously careful to avoid such contamination. See T. at 53-55. An impeaching conviction limited to the name of the offense and the date of conviction would not

Cert. Ct. File. The defendant failed to inform the trial court that the convictions were on appeal. Having neglected to alert the court to this allegedly crucial consideration, whether by oversight or design, the defendant should not protest that "the interests of justice" mandate reversal for abuse of discretion. See Defendant's Brief at 33-35.

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have betrayed a "similarity between the facts" to the crimes charged here.

EXCERPTS FROM RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION TO REARGUE

In his motion to reargue, the defendant contends that this Court has neglected to consider the trial court's allegedly erroneous denial of his motion to suppress evidence "of the pieces of paper that were in his pocket . . ." Defendant's Motion to Reargue at 1. The defendant asserts that such a suppression claim was fairly presented "in his brief and reply brief . . ." Id. In fact, examination of the briefs shows that such a claim was barely mentioned in conclusory terms, without citation to authority or the record, as a terse appendage to the defendant's Licari claim. See Defendant's Brief at 12; Defendant's Reply Brief at 3. Mere mention of such a suppression claim

cannot be deemed to have placed the issue distinctly before this Court. See Rodriguez v. Mallory Battery Co., 188 Conn. 145, 149, __ A.2d __ (1982) (Assignments of error merely mentioned but not briefed deemed abandoned).

. . . .

Secondly, the defendant contends that this Court did not address the "constitutional due process and self-incriminating issues" concerning his prior convictions argued in his brief. Defendant's Motion to Reargue at 1-2. As the State pointed out in its brief and at oral argument, these grounds were never presented to the trial court below; there is no evidence on the

record that the trial court was ever apprised of the merits of the defendant's then-pending appeal . . .

EXCERPTS FROM RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR CERTIFICATION TO THE CONNECTICUT SUPREME COURT

[T]he record reflects that defense counsel never informed the trial court that the convictions were constitutionally defective; indeed, the motion in limine failed to divulge that the convictions were even on appeal.[3] See Record at 28-31. This failure to inform the trial court of essential facts bearing on its ruling suggests "trial by ambuscade," a practice that this court has not been slow to condemn. See State v. Sinclair, 197 Conn. 574, 579, 500 A.2d 539 (1985), and cases cited therein.

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[3] This lapse is especially curious as the defendant now insists that the merits of the appeal were evident on the face of the appeal papers. See Defendant's Petition for Certification at 9.

The defendant protests that this default is excused by State v. Evans, 165 Conn. 61, 70, 327 A.2d 576 (1973) or by the doctrine of plain error, Practice Book § 3063. Defendant's Petition for Certification at 11-12. The short answer is that neither is intended as a device to permit the defendant to plant a bomb in the trial court and only light the fuse on appeal. As the Evans court cautioned: "[I]t is not true that defense counsel in criminal cases may through neglect, inattention or as at trial strategy refrain from...raising in the trial court any available constitutional defenses, confident that if the outcome of the trial proves unsatisfactory without...raising any available constitutional issue they may still prevail by assigning error of raising

the constitutional issue for the first time on appeal." 165 Conn. at 67. Moreover, as this Court held recently: "[E]rror induced by an appellant cannot be a ground for reversal and will not be reviewed. State v. Ross, 189 Conn. 42, 47, 454 A.2d 266 (1983); State v. Kish, 186 Conn. 757, 769, 443 A.2d 1274 (1982)." State v. Silveira, 198 Conn. 454, 467, __ A.2d __ (1986), quoting State v. Hinckley, 198 Conn. 77, 81 n.2, __ A.2d __ (1985).

. . . .

Moreover, the defendant's suppression claim cannot even be said to have been fairly presented to the Appellate Court. Examination of the defendant's briefs shows that such a claim was barely mentioned in conclusory terms,

without citation to authority or the record, as a terse appendage to the defendant's Licari claim. See Defendant's Brief at 12; Defendant's Reply Brief at 3. Mere mention of such a suppression claim cannot be deemed to have placed the issue distinctly before that Court. See Rodriquez v. Mallory Battery Co., 188 Conn. 145, 149, __ A.2d __ (1982) (Assignments of error merely mentioned but not briefed deemed abandoned).